No. 2357

United States

Circuit Court of Appeals

For the Ninth Circuit.

PERRIS IRRIGATION DISTRICT, a Corporation,

Plaintiff in Error,

vs.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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For Defendants in Error:

OSCAR C. MUELLER, Esq., 404-52-4-6 Wilcox Building, 206 South Spring Street, Los Angeles, California. [4*]

WILLIAM M. HIATT, Esq., 404-52-4-6 Wilcox Building, 206 South Spring Street, Los Angeles, California.

In the United States District Court, Ninth Circuit, in and for the Southern District of California, Southern Division.

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

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*Page-number appearing at foot of page of original certified Record.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you, between PERRIS IRRIGATION DISTRICT, plaintiff in error, and ESCHER & RAHN, defendants in error, a manifest error has happened to the damage of Perris Irrigation District, plaintiff in error, as by complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then [5] and there held, and that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 15th day of August, 1913.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

Allowed this, the 16th day of August, 1913.

OLIN WELLBORN,
United States District Judge.

I hereby certify that a copy of the within Writ of Error was on the 16th day of August, 1913, lodged in the Clerk's office of the said United States District Court, for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy. [6]

[Endorsed]: No. 1226—Law. In the District Court of the United States, in and for the Southern District of California, Ninth Circuit, Southern Division. Conrad Escher & Louis Rahn, Copartners Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Writ of Error. Filed, Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the United States District Court, Ninth Circuit, in and for the Southern District of California, Southern Division.

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Citation [on Writ of Error (Original)].

United States of America, to Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, and to Oscar Mueller and William M. Hiatt, Their Attorneys:

YOU ARE HEREBY NOTIFIED, That in a certain action at law in the United States District Court in and for the Southern District of California, wherein Conrad Escher and Louis Rahn, copartners doing business as Escher & Rahn, are plaintiffs, and Perris Irrigation District is defendant, a writ of error has been allowed on the petition of the Perris Irrigation District, defendant therein, to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, 30 days after the date of this citation, to show cause, if any there be, why the judgment and order appealed from should not be corrected, and speedy justice done the parties in that behalf.

WITNESS, The Honorable OLIN WELLBORN, Judge of the United States District Court for the Southern District of California, this 16th day of August, A. D. 1913.

OLIN WELLBORN,
United States District Judge. [8]

[Endorsed]: No. 1226—Law. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Citation. Received Copy of Within Citation. Aug. 18, '13. Oscar C. Mueller, Wm. M. Hiatt. Filed Aug. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

In the District Court of the United States of America, in and for the Southern District of California.

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

THE PERRIS IRRIGATION DISTRICT (a Corporation),
Defendant [10]

In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

JOHN ESCHER and WILLIAM RAHN, Copartners, Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Complaint.

Now come the plaintiffs and complaining of the defendant, for cause of action allege:

FIRST COUNT.

I.

That the plaintiffs are and at all the times herein named were copartners, doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant is, and at all the times hereinafter mentioned, was, an irrigation district organized, incorporated, and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the

State of California, amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California [11]

III.

That said irrigation district, at the time it was organized and incorporated, was wholly situated in the Counties of San Diego and San Bernardino, State of California, but that subsequent to its said incorporation, to wit, on March 11th, 1893, and subsequent to the issuance of its bonds, the County of Riverside in said State was created, and that said district thereafter was and now is wholly within the boundaries of said Riverside County.

IV.

That said defendant Perris Irrigation District, under and pursuant to the said act of the Legislature of the State of California, approved March 7th, 1887, and by its board of directors and officers thereunto duly authorized, issued a bond of said irrigation district, which was and is in the words and figures following:

Bond No. 76.

United States of America. State of California.
$500. $500.

Bond of
THE PERRIS IRRIGATION DISTRICT.
Total Issue: $442,000.

Located in San Diego and San Bernardino Counties, Cal.

For value received The Perris Irrigation District, a public corporation, duly organized and existing un-

der and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of ($500) five hundred dollars, in gold coin of the United States, at the dates and upon the installments as follows: At the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date ten (10) per cent of said sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons [12] hereto attached. And said district promises to pay interest on the said principal at the rate of (6) six per cent per annum, payable in gold coin of the United States, at the office of the treasurer of said district semi-annually on the first day of January and July of each year, upon the surrender of the respective interest coupons thereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in

the aggregate to four hundred and forty-two thousand dollars caused to be issued by the board of directors of said Perris Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 1st day of November, 1890. The said series, of which this bond is one, is composed of eight hundred and eighty-four bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of an act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7th, 1887.

All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon real property of the district, which tax is, and the said bonds are, by said act of the Legislature, made a lien upon all said real property.

In witness whereof said Perris Irrigation District has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its secretary to be affixed to each of said coupons at the office of the board of directors in said district,

this 1st day of January, A. D. 1891.

[Corporate Seal]

PERRIS IRRIGATION DISTRICT,

By J. W. NANCE,

President of said Board.

By H. A. PLIMPTON,

Secretary of said Board.

[Endorsed]: No. 76. Bond of the Perris Irrigation District. $500. Dated, January 1st, A. D. 1891. Interest, 6 per cent per annum. Payable January 1st and July 1st.

V.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain coupon No. 22, which said coupon was and is in the words and figures following, to wit:

$15.00. Interest Coupon No. 22.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of fifteen dollars in United States gold coin, being [13] semi-annual interest on bond.

No. 76. H. A. PLIMPTON,

Secretary.

VI.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond

were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

VII.

That subsequent to the issuance of said bond, and prior to the commencement of this action, these plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the coupons thereto attached, including said coupon No. 22, and said plaintiffs ever since have been and now are the owners and holders of said bond and all coupons thereto attached.

VIII.

That said coupon No. 22 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said coupon the sum of $15.00, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

SECOND COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege: [14]

I.

That the plaintiffs are and at all the times herein named were copartners, doing business under the firm name and style of Escher and Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant Perris Irrigation District is, and at all the times herein mentioned was, an irrigation district, organized, incorporated and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That heretofore, to wit, on or about the 1st day of January, A. D. 1891, the said Perris Irrigation District, under and pursuant to the said act of the legislature of the State of California, approved March 7, 1887, and by its board of directors and officers thereunto duly authorized, issued certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers thereof, and which said bonds were respectively numbered as follows, to wit: 77 to 87, both inclusive; 90 to 96, both inclusive; 277; 279 to 289, both inclusive; 292 to 295, both inclusive; 299 to 303, both inclusive; 305 to 354, both inclusive; 389 to 400, both inclusive; 406 to 415, both inclusive; 644; 645; 678 to 680, both inclusive; 681. **[15]**

IV.

That there were attached to the aforesaid bonds at the time of their issuance, certain interest bearing coupons, each of which was of the same tenor and effect and made and executed in the same form and manner as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof, date of maturity and amount of payment; that of said coupons all those hereinafter specifically described were by the terms thereof payable prior to the commencement of this action and subsequent to January 1st, 1902; that one hundred and seventeen of said coupons, in addition to the coupon specifically described in the first count of this complaint, were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds were attached one of said coupons numbered 22, and that one hundred and eighteen of said coupons were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds was attached one of said coupons numbered 23, and that said coupons numbered 23 were in the same words and figures as the above described coupons numbered 22, except as to the number thereof, date of maturity and amount of payment, the amount of said payment being $14.25, and date of maturity being July 1st, 1902.

V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary

course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid two hundred and thirty-five coupons, in addition to the coupon hereinbefore specifically set forth in the first count of this complaint, and ever since have been and [16] now are the owners and holders of all said coupons.

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said two hundred and thirty-five coupons the sum of $3,436.50, with interest thereon at the rate of seven per cent per annum from the date when each of said coupons respectively fell due.

THIRD COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II, III and IV of the first count herein contained; and further allege:

II.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain installment coupon, being for the payment of a portion of the principal thereof, which said coupon was and is in the words and figures following, to wit:

$25.00. Installment Coupon No. 1.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer

of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of twenty-five dollars in United States gold coin, being the first installment of principal on Bond No. 76 of said district. Interest will cease after maturity.

H. A. PLIMPTON,
Secretary.

Dated January 1st, 1891. [17]

III.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

IV.

That subsequent to the issuance of said bond, and prior to the commencement of this action, the plaintiffs, did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the installment coupon thereto attached numbered 1, and said plaintiffs ever since have been and now are the owners and holders of said bond and the installment coupon thereto attached.

V.

That said coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said installment coupon the sum of $25, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

FOURTH COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II and III of the second count herein contained, and further [18] allege.

II.

That there was attached to each of the aforesaid bonds, at the time of their issuance, an installment coupon of the same number, tenor and effect, and made and executed in the same form and manner as the coupon specifically described in the third count of this complaint; that all of said coupons were, by their terms, payable prior to the commencement of this action, and subsequent to January 1st, 1902.

III.

That subsequent to the issuance of said bonds and installment coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid one hundred and seventeen installment coupons, in addition to the coupon hereinbefore specifically set forth in the third count of this

complaint, and ever since have been and now are the owners and holders of all said installment coupons.

IV.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said one hundred and seventeen installment coupons the sum of $2,925.00, with interest thereon at the rate of seven per cent per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiffs pray judgment against said defendant in the sum of $6,401.50, together with interest as aforesaid, and for costs of suit.

C. C. WRIGHT,
Attorney for Plaintiffs. [19]

State of California,
County of Los Angeles,—ss.

C. C. Wright, being first duly sworn, deposes and says: I am the attorney for the plaintiffs in the above-entitled cause and make this verification in their behalf. That said plaintiffs are without the City of Los Angeles and State of California, to wit, in the Republic of Switzerland. I reside and have my office in the said city of Los Angeles, California, wherefore I make this verification.

I have read the complaint herein and know the contents thereof; the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

C. C. WRIGHT.

Subscribed and sworn to before me this 27th day of December, 1905.

[Seal] CORA MAPLE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. John Escher and William Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Complaint. Filed Dec. 28, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. C. C. Wright, Rooms 354-6-8 Wilcox Building, Los Angeles, Cal., Solicitor for Plaintiffs. [20]

In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

CONRAD ESCHER and LOUIS RAHN, Copartners, Doing Business as ESCHER & RAHN (Erroneously Suing Herein as JOHN ESCHER and WILLIAM RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Amended Complaint.

Now come the plaintiffs and file this, their Amended Complaint, and for cause of action allege:

I.

That the plaintiffs are, and at all the times herein named were, copartners doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland, and that their true names are Conrad Escher and Louis Rahn, and not John Escher and William Rahn, as alleged in the original complaint on file herein.

II.

That said defendant is, and at all the times hereinafter mentioned was, an irrigation district organized, incorporated and existing under and by virtue of an Act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to [21] said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That said irrigation district, at the time it was organized and incorporated, was wholly situated in the counties of San Diego and San Bernardino, State of California, but that subsequent to its said incorporation, to wit, on March 11th, 1893, and subsequent to the issuance of its bonds, the County of Riverside in said State was created, and that said district thereafter was and now is wholly within the boundaries of said Riverside County.

IV.

That said defendant Perris Irrigation District, under and pursuant to the said act of the Legislature of the State of California, approved March 7, 1887, and by its Board of Directors and officers thereunto duly authorized, issued a bond of said irrigation district, which was and is in the words and figures following:

Bond No. 76.

United States of America. State of California.
$500. $500.

Bond of
THE PERRIS IRRIGATION DISTRICT.
Total Issue: $442,000.
Located in San Diego and San Bernardino Counties, Cal.

For value received The Perris Irrigation District, a public corporation, duly organized and existing under and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of ($500) five hundred dollars, in gold coin of the United States, at the dates and upon the installments as follows: At the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date, ten (10) per cent of said

sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons hereto attached. And said district promises to pay interest on the [22] said principal at the rate of (6) per cent per annum, payable in gold coin of the United States, at the office of the treasurer of said district semi-annually on the first day of January and July of each year, upon the surrender of the respective interest coupons thereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to four hundred and forty-two thousand dollars caused to be issued by the board of directors of said Perris Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 1st day of November, 1890. The said series of which this bond is one, is composed of eight hundred and eighty-four bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of an act of the Legislature of the State of California, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other

property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887.

All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon real property of the district, which tax is, and the said bonds are, by said act of the Legislature, made a lien upon all said real property.

In witness whereof, said Perris Irrigation District has caused these bonds to be issued and signed by its president and the lithographed signature of its secretary to be affixed to each of said coupons at the office of the board of directors in said district, this 1st day of January, A. D. 1891.

[Corporate Seal]

PERRIS IRRIGATION DISTRICT.

By J. W. NANCE,

President of said Board.

By H. A. PLIMPTON,

Secretary of said Board.

[Endorsed]: No. 76. Bond of the Perris Irrigation District. $500. Dated January 1st, A. D. 1891. Interest, 6 per cent per annum. Payable January 1st and July 1st.

V.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain coupon No. 22, which said coupon was and is in the words and figures following, to wit:

$15.00. Interest Coupon No. 22.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer

of said district in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of fifteen dollars in United States gold coin, being semi-annual interest on bond.

No. 76. H. A. PLIMPTON,
Secretary.

VI.

That at the time of the issuance of said bond and coupon [23] thereto attached, J. W. Nance was the president of the said Board of Directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their said respective capacities, and the signature to said coupon is and was the signature of said H. A. Plimpton, secretary as aforesaid.

VII.

That subsequent to the issuance of said bond, and prior to the commencement of this action, these plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond, and also the coupons thereto, attached, including coupon No. 22, and said plaintiffs ever since have been and now are the owners and holders of said bond and all coupons thereto attached.

VIII.

That said coupon No. 22 has not been paid, nor has any part thereof been paid; that there is now

due, owing and unpaid to the plaintiffs on said coupon the sum of $15.00, with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

SECOND COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

That the plaintiffs are copartners, doing business under the firm name and style of Escher & Rahn, and that each of them is a citizen of the Republic of Switzerland.

II.

That said defendant Perris Irrigation District is, and at all the times herein mentioned was, an irrigation district, organized, [24] incorporated and existing under and by virtue of an act of the Legislature of the State of California, entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory and supplemental to said act, and said irrigation district is wholly situated in the County of Riverside, State of California.

III.

That heretofore, to wit, on or about the 1st day of January, A. D. 1891, the said Perris Irrigation District, under and pursuant to the said Act of the Legislature of the State of California, approved March 7,

1887, and by its board of directors and officers thereunto duly authorized, issued certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the numbers thereof, and which said bonds were respectively numbered as follows, to wit, 77 to 87, both inclusive; 90 to 96, both inclusive; 277; 279 to 289, both inclusive; 292 to 295, both inclusive; 299 to 303, both inclusive; 305 to 354, both inclusive; 389 to 400, both inclusive; 406 to 415, both inclusive; 644; 645; 678 to 680, both inclusive; 681.

VI.

That there were attached to the aforesaid bonds at the time of their issuance, certain interest-bearing coupons, each of which was of the same tenor and effect and made and executed in the same form and manner as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof, date of maturity and amount of payment; that of said coupons all [25] those hereinafter specifically described were by the terms thereof payable prior to the commencement of this action and subsequent to January 1st, 1902; that one hundred and seventeen of said coupons, in addition to the coupon specifically described in the first count of this complaint, were at the time of the issuance thereof attached to the aforesaid designated bonds as follows, to wit, to each of said bonds were attached one of said coupons numbered 22, and that one hundred and eighteen of said coupons were at the time of the issuance thereof attached to the afore-

said designated bonds as follows, to wit, to each of said bonds was attached one of said coupons numbered 23, and that said coupons numbered 23 were in the same words and figures as the above-described coupons numbered 22, except as to the number thereof, date of maturity and amount of payment, the amount of said payment being $14.25, and date of maturity being July 1st, 1902.

V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid two hundred and thirty-five coupons, in addition to the coupon hereinbefore specifically set forth in the first count of this complaint, and ever since have been and now are the owners and holders of all said coupons.

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said two hundred and thirty-five coupons the sum of $3,436.50, with interest thereon at the rate of seven per cent per annum from the date when each of said coupons respectively fell due. [26]

THIRD COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof paragraphs I, II, III and IV of the first count herein contained; and further allege:

II.

That attached to said bond is, and was at the time of the issuance thereof as aforesaid, a certain installment coupon, being for the payment of a portion of the principal thereof, which said coupon was and is in the words and figures following, to wit:

$25.00. Installment Coupon No. 1.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the treasurer of said district, in the county of San Diego, State of California, on the first day of January, 1902, on surrender of this coupon, the sum of twenty-five dollars in United States gold coin, being the first installment of principal on Bond No. 76 of said district. Interest will cease after maturity.

H. A. PLIMPTON,
Secretary.

Dated January 1st, 1891.

III.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the president of the said board of directors of the said Perris Irrigation District, and H. A. Plimpton was the secretary thereof. That the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their respective capacities, and the signature to said coupon is and was the sig-

nature of said H. A. Plimpton, secretary as aforesaid.

IV

That subsequent to the issuance of said bond, and prior to the commencement of this action, the plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the installment coupon thereto attached numbered 1, and said plaintiffs ever since [27] have been and now are the owners and holders of said bond and the installment coupon thereto attached.

V.

That said coupon No. 1 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiffs on said installment coupon the sum of $25; with interest thereon at the rate of 7 per cent per annum from the 1st day of January, 1902.

FOURTH COUNT.

And for a further, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs repeat and make a part hereof Paragraphs I, II and III of the second count herein contained, and further allege:

II.

That there was attached to each of the aforesaid bonds, at the time of their issuance, an installment coupon of the same number, tenor and effect, and made and executed in the same form and manner as

the coupon specifically described in the third count of this complaint; that all of said coupons were, by their terms payable prior to the commencement of this action, and subsequent to January 1st, 1902.

III.

That subsequent to the issuance of said bonds and installment coupons, and prior to the commencement of this action, plaintiffs did, in good faith, in the ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid one hundred and seventeen installment coupons, in addition to the coupon hereinbefore specifically set forth in the third count of this complaint, and ever since have been and now are the owners and holders of all said installment coupons. [28]

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said one hundred and seventeen installment coupons the sum of $2,925.00, with interest thereon at the rate of seven per cent per annum from the date when each of said installment coupons respectively fell due.

WHEREFORE, plaintiffs pray judgment against said defendants in the sum of $6,401.50, together with interest as aforesaid, and for costs of suit.

OSCAR C. MUELLER,
Attorney for Plaintiffs.

State of California,
County of Los Angeles,—ss.

Oscar C. Mueller, being first duly sworn, deposes and says: I am the attorney for the plaintiffs in the above-entitled cause, and make this verification in their behalf;

That said plaintiffs are without the City of Los Angeles and State of California, to wit, in the Republic of Switzerland; I reside and have my office in the said City of Los Angeles, California, wherefore I make this verification.

I have read the amended complaint herein and know the contents thereof; the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

OSCAR C. MUELLER.

Subscribed and sworn to before me, this 28th day of December, 1906.

[Seal] WALTER J. LUNDY,
Notary Public in and for the County of Los Angeles, State of California. [29]

[Endorsed]: No. 1226. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Escher, Plaintiffs, vs. Perris Irrigation District, Defendant. Amended Complaint. Filed Dec. 28, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Oscar C. Mueller, Attorney at Law, 454–6–8 Wilcox Building, Los Angeles, Cal., Attorney for Plaintiffs. [30]

[Summons.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

CONRAD ESCHER and LOUIS RAHN, Copartners, Doing Business as ESCHER & RAHN (Erroneously Suing Herein as JOHN ESCHER and WILLIAM RAHN, Copartners Doing Business as ESCHER & RAHN),

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court in the City of Los Angeles, County of Los Angeles.

The President of the United States of America, Greeting, To Perris Irrigation District:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer to the amended complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or

judgment by default will be taken against you.

The said action is brought to recover the sum of $6,401.50, of which said plaintiff alleges $3,451.50 to be due and owing from defendant in payment of certain interest bearing coupons, all payable prior to the commencement of this action and subsequent to December 31st, 1901, which coupons were attached at the time of their issuance to 118 bonds duly issued by the defendant on or about the first day of January, 1891, and which said bonds together with the said coupons subsequent to their issuance and prior to the commencement of this action plaintiffs in good faith and in the ordinary course of business and for value before the apparent [31] maturity of said bonds or of said coupons or any of them, and without the knowledge of any defects therein, acquired and ever since have been and are now the owners and holders thereof; and plaintiff further alleges that said coupons have not, nor has any part of any one of said coupons, been paid; plaintiff also prays judgment for interest at the rate of seven per cent per annum from the date when each of said coupons respectively fell due; plaintiff further alleges that of said sum of $6,401.50 the sum of $2,950.00 is due and owing from the defendant in the payment of certain installment coupons attached to each of the aforesaid bonds at the time of their issuance, all of which installment coupons were payable prior to the commencement of this action and subsequent to January 1st, 1902, and that the said installment coupons have not been paid, nor has any part of any one of said coupons been paid, that there is now due, owing and

unpaid on said 118 installment coupons the sum of $2,950.00 with interest thereon at the rate of seven per cent per annum from the date on which each of the said coupons respectively fell due; that the total amount of the installments due and unpaid upon all of said bonds is the sum of $2,950.00; plaintiffs also pray judgment for interest in said installments at the rate of seven per cent per annum from the time they respectively fell due and for costs of suit; all of which more fully appears from the complaint on file in this case, to which you are hereby expressly referred.

And if you fail to appear, and plead, answer or demur, as herein required, your default will be entered and the plaintiff will take judgment against you for the sum demanded in the amended complaint, to wit, the sum of $6.401.50 and interest and costs. [32]

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

[Seal] WM. M. VAN DYKE,
Clerk.
By Charles N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 2d day of July, 1907, and personally served the same on the —— day of ————, 1*8*, by delivering to and leaving with W. H. Pilch, July

9th, 1907, A. R. Frederick, July 20, 1907, A. McPherson, July 9th, 1907, Directors of the Perris Irrigation District, a corporation, said defendant named therein, personally, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto. A. R. Frederick and W. H. Pilch served in Riverside Co., and D. McPherson served in San Bernardino Co. in said district.

LEO V. YOUNGWORTH,
U. S. Marshal.
By B. H. Franklin,
Deputy.

Los Angeles, July 19, 1907.

[Endorsed]: Marshal's Doc. No. 967. No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher et al. vs. Perris Irrigation District. Summons. Oscar C. Mueller, Plaintiff's Attorney. Filed Jul. 25, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [33]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

CONRAD ESCHER et al.,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Amended Return of Service of Complaint and Summons.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY: That I received the Summons in the above-entitled action on the 3d day of January, 1907, and personally served the same on the Perris Irrigation District, the defendant therein named, by delivering to and leaving with W. H. Pilch, the President of and a member of, the Board of Directors of said Perris Irrigation District, a copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court; by delivering to and leaving with A. R. Frederick, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court; and by delivering to and leaving with D. McPherson, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court.

I FURTHER CERTIFY: That I delivered said certified copy of the Summons and Complaint to W. H. Pilch, personally on the 9th day of July, 1907, in the County of Riverside, State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to A. R. Fred-

erick, personally, on the 20th day of July, 1907, in the County of Riverside, [34] State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to D. McPherson, personally, on the 9th day of July, 1907, in the county of San Bernardino, State of California, and left the same with him.

LEO V. YOUNGWORTH,
United States Marshal.
By B. H. Franklin,
Deputy.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California. Conrad Escher et al, Plaintiff, vs. Perris Irrigation District, Defendant. Amended Return of Service of Complaint and Summons. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Oscar C. Mueller, Attorney for Plaintiff. [35]

In the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER et al.,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Default.

In this action the defendant, Perris Irrigation Dis-

trict, having been regularly served with process, and having failed to appear and plead to, answer, or demur to the plaintiff's complaint on file herein, and the time allowed by law for answering, pleading or demurring having expired, the default of said Perris Irrigation District in the premises is hereby duly entered, according to law.

Attest my hand and the seal of said Circuit Court this 12th day of September, A. D. 1907.

[Seal] WM. M. VAN DYKE,
Clerk.
By Charles N. Williams,
Deputy Clerk.

[Endorsed]: No. 1226. U. S. Circuit Court, Southern District of California, Southern Division. Conrad Escher et al. v. Perris Irrigation District. Default. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [36]

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1226.

ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Judgment.

Come now the plaintiffs in the above-entitled action and apply for the relief demanded in their com-

plaint filed herein; and it appearing to the satisfaction of the court that the Summons and Complaint in this action have been duly and regularly served upon the defendant, Perris Irrigation District; that the legal time for appearing and answering said complaint has expired and that said defendant has failed to appear and answer said complaint or *demurrer* thereto; and that the default of said defendant has heretofore been duly and regularly entered according to law;

IT IS HEREBY ORDERED that judgment be entered against said defendant, Perris Irrigation District, and in favor of plaintiffs in accordance with the prayer of plaintiffs' said complaint on file herein.

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiffs herein do have and recover from the defendant, Perris Irrigation District, the sum of $6,401.50 principal, [37] and $4,928.80 interest, in all the sum of $11,330.30, together with the plaintiffs' costs herein taxed at $———, and that this judgment bear interest at the rate of seven (7) per cent per annum from the date of its entry.

Judgment entered February 18, 1913.

W. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

No. 1226. United States District Court, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, De-

fendant. Copy Judgment. Filed Feb. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, 824 I. N. Van Nuys Building, 210 West 7th Street, Los Angeles Cal., Solicitor for Plaintiffs. [38]

[Certificate of Clerk U. S. District Court to Judgment-Roll.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book No. 2 of said Court for the Southern Division, at page 196 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the seal of said District Court this 18th day of February, A. D. 1913.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 1226. In the District Court of the United States for the Southern District of California, Southern Division. Escher & Rahn vs. Perris Irrigation District. Judgment-roll. Filed February 18th, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 2, page 196. **[39]**

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California.

Clerk's Office.

No. 1226.

CONRAD ESCHER et al.,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Praecipe to Enter Default.

To the Clerk of said Court:

Sir: The defendant, Perris Irrigation District, having failed to appear and answer the plaintiffs' Complaint herein, and the time for answering hav-

ing expired, you will therefore enter the default of said Defendant herein according to law.

Dated September 3, 1907.

OSCAR C. MUELLER,
Attorney for Plaintiffs.

[Endorsed]: No. 1226. U. S. Circuit Court, Ninth Circuit, Southern District of California. Conrad Escher et al., Plaintiffs, vs. Perris Irrigation District, Defendant. Praecipe for Entering Default. Filed Sept. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. **[40]**

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER, and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Notice of Motion to Set Aside Service of Summons.

To Conrad Escher and Louis Rahn, and to Oscar C. Mueller, Their attorney:

YOU ARE HEREBY NOTIFIED that the Perris Irrigation District, by its attorneys, John D. Works, Bradner Lee, Lewis R. Works and Frank W. Stafford, will appear in said court June 17, 1912, specially for the purpose set out in the motion, and

file said motion to set aside the service of summons in the above-entitled action on the ground that the Perris Irrigation District has never been served with summons in said action, nor has it ever entered appearance, accepted service or waived the service of summons in said action.

Said motion is made upon the records, files and proceedings of said court, in said action, together with the motion to set aside the service of summons and the affidavits thereto attached.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. **[41]**

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis *Escher,* Doing Business as Escher and Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Notice of Motion to Set Aside Service of Summons. Received copy of the within June, 6, 1912. Oscar C. Mueller, William M. Hiatt, Attys. for Plff. Filled Jun. 6, 1912. Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. Bradner Lee, Frank W. Stafford, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. **[42]**

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion to Set Aside Service of Summons.

Now comes the defendant and enters appearance, specially, in the above-entitled action, for the purpose of this motion only, and for no other purpose, and moves the Court to set aside the service of summons in said action, on the following grounds, to wit:

I.

That the persons served with summons in said action were not directors of the Perris Irrigation District at the time of service of summons on them in said action and reference is made to the affidavits hereto attached and are made a part of this motion and to the law governing the Perris Irrigation District and irrigation districts in the State of California, at page 262 of Statutes and amendments to the codes of California, of 1897, which statute in part reads as follows: "Sec. 26. A director shall be a resident and freeholder of the irrigation district, but not necessarily of the division for which he is elected." **[43]**

The Political Code of California provides in Sec. 996; VACANCIES, HOW THEY OCCUR.—An office becomes vacant on the happening of either of the following events before the expiration of the term:

(Subvd.) 3. His resignation.

(Subvd.) 5. His ceasing to be an inhabitant of the State, or, if the office be local, of the district, county, city, or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged.

(Subdv.) 7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State by permission of the legislature:

II.

That the summons was not served as required by section 411 of Code of Civil Procedure, of the State of California, which provides as follows:

"Sec. 411. SUMMONS, HOW SERVED.—The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, secretary, cashier or managing agent thereof."

III.

That the Complaint in said motion was filed De-

cember 28th, 1905, and the summons was executed by the clerk of said court on the 28th day of December, 1906, that said summons was received by the United States Marshal on July 2d, 1907, and was attempted to be served July 9th, 1907, on certain persons alleged to have been directors of the Perris Irrigation District. That the summons was not issued within one year to any person able and authorized to serve the same, and if such summons was issued to some person able and authorized to serve the same, within said year, then it is not shown that due diligence was used to procure service of said summons within sixty days after the issuance of the said summons. **[44]**

That the said motion is made upon the records, files and proceedings in said court, in said action, and affidavits hereto attached.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. **[45]**

[Affidavit of Edith C. Frederick in Support of Motion to Set Aside Summons.]

State of California,
County of Riverside,—ss.

EDITH C. FREDERICKS, being duly sworn, on her oath says: That she was the wife of A. R. Frederick of Riverside County, California, from the year 1895 until 1905; that immediately after the marriage of affiant with A. R. Frederick he conveyed to her certain parcels and tracts of real estate in the Perris

Irrigation District, County of Riverside, State of California, and that the said A. R. Frederick never owned or had any legal interest in any real property within the limits of the Perris Irrigation District other than that so conveyed to this affiant until this affiant in the year 1906, after she had been divorced from said A. R. Frederick, conveyed the said real estate heretofore mentioned to the said A. R. Frederick; that on or about December, 1904, or January, 1905, the said A. R. Frederick removed from the Perris Irrigation District, and took up his residence at a point in Riverside County, outside of said Perris Irrigation District, known as Good Hope Mine; that thereafter the said A. R. Frederick removed to the Town of Lake View, which is without the boundaries of the Perris Irrigation District, in the said County of Riverside, and that said A. R. Frederick beginning at the time stated was not a resident of the Perris Irrigation District for more than one year, and to the best of affiant's knowledge and belief he did not again become a resident of Perris Irrigation District for a considerable period of time thereafter, and that the said A. R. Frederick has been absent subsequent to his return to Perris Irrigation District as aforesaid, and has left the said District and remained away from said District for long periods of time; and further affiant sayeth not.

EDITH C. FREDERICK.

Subscribed and sworn to before me this 4th day of June, 1912.

[Seal] K. D. HARGER,

Notary Public in and for Riverside County, State of California. **[46]**

Affidavit [of A. R. Frederick in Support of Motion to Set Aside Summons].

State of California,

County of Riverside,—ss.

A. R. Frederick, being duly sworn, on his oath states that on July 7, 1902, and for several years prior thereto, he was not the legal owner of any real estate within the boundaries of the Perris Irrigation District, in the County of Riverside, State of California, nor was he such owner until the year 1906, when by conveyance he received a legal title to certain parcels of real property in the said District; that on July 7, 1902, he was a resident of the Perris Irrigation District in the County of Riverside, State of California, and continued to be such resident until the latter part of 1904 or the first months of 1905, when he removed from Perris Irrigation District and resided without the said Perris Irrigation District for a period of more than one year;

That he was appointed a Director of the Perris Irrigation District on or about July 7, 1902; that no lawful meeting of the Board of Directors appointed at said date, viz.: W. H. Pilch, D. McPherson and this affiant was held, no secretary was appointed nor did this affiant or any of the other Directors after the year 1902 within his knowledge

ever believe that they were authorized nor did they perform any duty required of them by law as Directors of the said Perris Irrigation District, and did at all times refuse to perform any official acts after the year 1902; and this affiant did specifically deny the fact that he was such Director to the Deputy United States Marshal at the time of serving of Summons upon him in the actions now pending, said service being made in July, 1907; that to the best of affiant's knowledge and belief he was at that time residing in Riverside County, but without the boundaries of the Perris Irrigation District. And further affiant sayeth not.

[Seal] A. R. FREDERICK.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal] H. M. HARFORD,

Notary Public in and for the County of Riverside, State of California. [47]

[Affidavit of George H. Sawyer in Support of Motion to set aside Summons.]

State of California,

County of Riverside,—ss.

Geo. H. Sawyer, being first duly sworn on oath, says that he is a resident of the city of Riverside, County of Riverside, State of California; that he formerly was a resident in the Perris Irrigation District in said County; that he is personally acquainted with Duncan McPherson, also known as D. McPherson; that he was acquainted with the said Duncan McPherson during the period when the said

Duncan McPherson was a resident of the Perris Irrigation District in said county; that the said Duncan McPherson left the said Perris Irrigation District on or about December, 1904, and went to reside in Los Angeles County, where he remained for a short period only, and afterwards removed to Victorville, in San Bernardino County, where he is still a resident.

And further affiant says not.

GEO. H. SAWYER.

Subscribed and sworn to before me this 4th day of June, 1912.

[Seal] K. D. HARGER,
Notary Public. [48]

[Affidavit of H. M. Harford in Support of Motion to Set Aside Summons].

State of California,
County of Riverside.

H. M. Harford, of lawful age, first being duly sworn, deposes and says that he has been a resident of Perris in the Perris Irrigation District of Riverside County, California, since December 5, 1900, that he was well acquainted with D. McPherson, a former resident of Perris, and that said D. McPherson removed from Perris to Victorville, California, sometime prior to October, 1906.

H. M. HARFORD.

Subscribed and sworn to before me this 3d day of June, 1912,

[Seal] W. W. STEWART,
Notary Public in and for said County of Riverside, State of California. [49]

[Affidavit of K. D. Harger in Support of Motion to Set Aside Summons.]

State of California,
County of Riverside,—ss.

K. D. Harger, being first duly sworn on oath, says that he is Secretary of The Riverside Abstract Co., a corporation with its principal place of business at Riverside, California, that as such Secretary he is competent to make the following affidavit, and does make the following affidavit on behalf of said corporation; that the business of said corporation is that of examining the records of Land Titles in said County; that he has examined the records of Riverside County for the purpose of determining whether or not Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them was ever a freeholder in said county, and for the purpose of determining by said records what land, if any, the said Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District situated in said county; when they owned said land, if any, and when they disposed of same.

Further affiant says that the examination of said records reveals the following state of facts:

Wm. H. Pilch on Oct. 2, 1894, purchased from Julia A. Chandler and others, Lots 4, 5 and 12 in Chandler's Subdivision of the N. E. quarter of Sec. 13, T. 4 S., R. 4 W., S. B. B. & M. The deed given was recorded on Aug. 3, 1894 in Book 21 of Deeds, at page 107, Riverside County Recorder's Office.

The said Wm. H. Pilch on Oct. 15, 1894, conveyed

all of the above-described land to Mrs. Ruth E. Pilch. [50]

Duncan McPherson purchased on March 29, 1892, from Louis L. Newerf and wife lot 5 in Newerf's Subdivision in Sec. 6, T. 5 S., R. 3 W., S. B. B. & M. Said deed was recorded July 16, 1894, in Book 17 of Deeds, at page 85.

Said Duncan McPherson sold the above-described parcel of land to Thomas J. Robinson July 31, 1899, and said deed was recorded Aug. 3, 1899, in Book 78 of Deeds, at page 189.

Said Duncan McPherson purchased from W. A. Bingham and wife and John H. Lee and wife by Deed dated Sept. 12, 1901, the N. W. quarter of the S. E. quarter and the S. W. quarter of the S. E. quarter and the south half of the S. E. quarter of the S. E. quarter and the N. W. quarter of the S. E. quarter of the S. E. quarter, all in Sec. 32, T. 4 S., R. 3 W., S. B. B. & M.

Said deed was recorded March 8, 1902, in Book 118 of Deeds, at page 166. Said Duncan McPherson sold said land to C. I. Ritchy by deed dated March 7, 1902, and recorded March 8, 1902, in Book 132 of Deeds, at page 247.

A. R. Frederick purchased from the Perris Land Co., by deed dated Nov. 11, 1893, all of Lot 1, in Block 20 of the Riverside Tract, said deed was recorded Nov. 17, 1893, in Book 80 of Deeds at page 113. Said A. R. Frederick sold said parcel of land to M. L. Lawrence by deed dated Nov. 30, 1893, and recorded Feb. 21, 1894, in Book 10 of Deeds, at page 226.

Said A. R. Frederick purchased a second time Lot

1, in Block 20, Riverside Tract from Edith C. Frederick by deed dated April 25, 1906, and recorded April 25, 1906, in Book 225 of Deeds, at page 10.
[51]

Said A. R. Frederick sold said last described parcel July 20, 1907, to V. A. Lawrence, which deed was recorded July 22, 1907, in Book 250 of Deeds, at page 11.

Said A. R. Frederick purchased from Edith C. Frederick by deed dated Oct. 5, 1906, all of lots 23, 24 and 25 in Block 4 of the town of Perris, and lots 4, 5 and 6 in Block 1 of Blethen's Addition to Perris, which deed was recorded Oct. 5, 1906, in Book 225 of Deeds at page 330. Said A. R. Frederick sold said lots 23, 24 and 25 above-described to Alexander T. Crane by Deed dated April 20, 1907, and recorded May 13, 1907, in Book 240 of Deeds at page 86.

Said A. R. Frederick sold Lots 4, 5 and 6 in Block 1, above described, to Aurilla D. Thompson by Deed dated Aug. 6, 1907 and recorded Aug. 9, 1907, in Book 242 of Deeds, at page 303.

Further this Affiant says that the foregoing constitutes all of the land that the said Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District in said county as shown by said records, subsequent to the formation of Riverside County, June 5th, 1893.

K. D. HARGER.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal] RAYMOND BEST,
Notary Public.

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation Company. Motion to set aside service of Summons. Received copy of the within 6th day of June, 1912. Oscar C. Mueller, William M. Hiatt, Attys. for Plffs. Filed Jun 6. 1912. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. Bradner W. Lee, Frank W. Stafford, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Solicitors for Defendants. [52]

Notice of Motion [for Order Dismissing Action].

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

EQUITABLE INVESTMENT COMPANY, a Corporation,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

To the Plaintiff and to Oscar C. Mueller and W. M. Hiatt, Attorneys for Plaintiff.

Now comes the defendant in the above-entitled action and enters appearance, not generally but specially, and for the purpose of the motion herein mentioned and not otherwise.

You will please take notice that on Monday, the

24th day of June, 1912, at 10:30 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, the defendant will move the said court for an order dismissing the above-entitled action.

The said motion will be made upon the records, files and proceedings in said action and upon the written motion, copy of which is served upon you herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [53]

2. That the said records, files and proceedings affirmatively show that such is the fact, that the plaintiff failed "to make a *bona fide* effort to procure service of summons upon the defendant" in said action, "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
WORKS and JORDAN,
Attorneys for Defendants. [54]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

EQUITABLE INVESTMENT COMPANY, a Corporation,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion [for Order Dismissing Action].

Now comes the defendant in the above-entitled action and enters appearance, not generally but specially, for the purpose of this motion only and not otherwise, and moves the court for an order dismissing the above-entitled action.

The said motion is made upon the records, files and proceedings herein, pursuant to the notice of motion served upon you herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

2. That the said records, files and proceedings affirmatively show that such is the fact, that the plaintiff failed "to make a *bona fide* effort to procure ser-

vice of summons upon the defendant in said action "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
WORKS and JORDAN,
Attorneys for Defendant. [55]

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. *Equitable Investment Company,* a Corporation, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion and Motion. Received copy of the within Notice June 19, 1912. Oscar C. Mueller per F. Strubbe. Filed Jun. 19, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, Works and Jordan, Solicitors for Defendants. [56]

In the United States District Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners, Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Affidavit [of Oscar C. Mueller], Dated July 20, 1912.

State of California,
County of Los Angeles,—ss.

Oscar C. Mueller, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that the complaint in said action was filed December 29th, 1904; that the summons in said action was duly issued by the Clerk of this Court on December 16th, 1905; that the Hon. C. C. Wright was the attorney for the plaintiff in said action and appeared as such attorney at the time of the filing of said complaint herein, and continued as the attorney for the plaintiff in said action until his death, January 18, 1906; that thereafter affiant was substituted as one of the attorneys for the plaintiff in said action and has continued ever since to be and now is, one of the attorneys for said plaintiff in said action; that he inquired of the Hon. John D. Works, one of the attorneys now

appearing for the defendant in said action, as to who were the officers of the said defendant District; that said Hon. John D. Works had theretofore represented said Perris Irrigation District in another action brought in the Circuit Court of the United States for the Southern District of California, by said [57] plaintiff against said defendant, which action had theretofore been tried and judgment entered and had been appealed and the judgment affirmed by the United States Circuit Court of Appeals, Ninth Circuit; that said Hon. John D. Works informed affiant that he did not know who are the officers of the District; that he did not know where the minute-books or records of the District could be obtained, and that he did not know where the information which affiant desired could be obtained; that thereafter, and in the early part of the year 1907, affiant made a trip to the town of Perris, situated within the limits of said defendant District; that he inquired of many persons living there, who the officers of the District were, but could obtain no information concerning the same; that affiant employed the Pinkerton Detective Agency to make an investigation for the purpose of learning who were the officers of said defendant District; that after such investigation, which investigation covered a considerable period of time, said detective agency gave affiant the names and residences of three of the persons, to wit, W. H. Pilch, Duncan MacPherson, and A. R. Frederick, who were reputed to be the directors of said defendant District, and reported that said W. H. Pilch was reputed to be the President of said Dis-

trict; that from the time affiant became one of the attorneys for the plaintiff in said action, until just prior to the time the summons in said action was delivered to the United States Marshal for service affiant was making every effort to learn who were the officers of said defendant District, and who was the President of said District, and the person upon whom such service should be made; that during said time whenever he met any person residing in said District, or who had resided in said [58] District, or whom he thought by any chance might have knowledge of who were the officers of said District, he inquired concerning such officers, but was never able to get any such information until prior to the delivery of said summons to said United States Marshal for service; that during said time he inquired and endeavored to obtain such information from a very large number of people; that the plaintiff in said action resided in the City of Brooklyn, in the State of New York; that said plaintiff informed affiant that he had no knowledge concerning who were the officers of said District.

OSCAR C. MUELLER.

Subscribed and sworn to before me this 20th day of July, 1912.

[Seal] ANNA M. McGREW,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 26, 1915.

[Endorsed]: No. 1226. United States District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plain-

tiffs, vs. Perris Irrigation District, Defendant. Affidavit. Received copy of the within affidavit this 31st day of July, 1912. John D. Works, Lewis R. Works, Bradner W. Lee, Frank W. Stafford, Solicitors for Defendant. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, 404—452—4—6 Wilcox Building, 206 South Spring St., Los Angeles, Cal., Solicitor for Plaintiffs. [59]

In the United States District Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners, Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Affidavit [of William M. Hiatt].

State of California,
County of Los Angeles,—ss.

William M. Hiatt, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that after becoming one of such attorneys and until about the time of the delivery of the summons in said action to the United States Marshal for service, he made inquiry of all persons whom he met and whom he

thought might have knowledge of the affairs of said defendant District, but that no persons of whom he so inquired could give or would give affiant any information concerning who were the officers of said defendant District; and that he was unable to learn who was the President of the Board of Directors of said defendant District until within a short time prior to the service of the summons in said action; that on or about the first day of May, 1907, affiant went to the town of Perris, situated within the limits of said defendant District, for the purpose of endeavoring to learn who were the officers of said defendant District, and for the purpose of endeavoring to locate and obtain inspection of the minute books of said defendant District; that he inquired of Mr. Hook, one of the firm of Hook Bros. engaged in business in said town, but that said Mr. Hook [60] could not or would not give affiant the name of any director or officer of said defendant District; that affiant also inquired of Mr. Hook where the minute-books of said District could be found, and said Mr. Hook informed affiant that he did not know where any of the minute-books of said District were or where they could be found, or who could give any information concerning the whereabouts of said minute-books; that affiant also inquired of a Mr. Gates, a Justice of the Peace residing in said town, but that said Mr. Gates could not or would not give affiant any information concerning who were the officers of the said District or concerning any of the records of the District; that affiant inquired of a number of other persons residing in said District, whose names affiant

does not now remember, but that affiant was unable to obtain from any person any information as to who were the directors of said District, or who was the President of said District, or who was the Secretary of said District, or as to the whereabouts of the minute-books of said District; that affiant requested the Riverside Abstract Company to make a search of the records of the County Recorder's office of the County of Riverside, the same being the county within which said defendant District is situated, and to make a report to affiant giving the name of every person who had ever filed, in said recorder's office a bond as a director of said District; that from the report of said Riverside Abstract Company, received by affiant pursuant to such request, it appeared that A. R. Frederick, W. H. Pilch, and Duncan McPherson were the last persons to file in said recorder's office, bonds as directors of said District.

WILLIAM M. HIATT.

Subscribed and sworn to before me this 30th day of August, 1912.

[Seal] ANNA M. McGREW,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 26, 1915. [61]

[Endorsed]: No. 1226. In the U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, doing business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Affidavit. Rec'd copy of within aff. this 31st day of Aug. 1912. Works, Lee & Works, Lewis

R. Works, Attys. for Deft. Oscar C. Mueller and William M. Hiatt, Attorneys for Plaintiff. Frank W. Stafford. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [62]

In the United States District Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit of [Oscar C. Mueller, Dated July 12, 1912].

State of California,
County of Los Angeles,—ss.

Oscar C. Mueller, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has inquired of Lewis R. Works, one of the attorneys for the defendant, in reference to the whereabouts of the minute-books of the defendant; that said Lewis R. Works produced and allowed affiant to inspect one book which purported to be a volume of the minutes of said defendant, and informed affiant that other volumes of said minutes were in the custody of Layfayette Gill, an attorney at law, having an office at Riverside, California, that affiant, on the 26th day of June, 1912, went to Riverside, California, and to

the office of said Layfayette Gill, and was there shown two books purporting to be minute-books of said defendant; that none of the books shown to affiant contained the minutes of any meetings of the Board of Directors of the Perris Irrigation District, subsequent to the year 1893; that affiant does not know where the books containing the records of the proceedings of said Board of Directors of said defendant District, subsequent to the year 1893 are to be found, although he has made diligent inquiry for the same; that affiant while at Riverside, on said 26th day of June, 1912, [63] examined the papers and files in the office of the County Clerk of said County, in an action entitled, "J. C. Cullen, Plaintiff, vs. Perris Irrigation District, Defendant," No. 2201 in the Superior Court of said County; that said action was commenced in the Superior Court of the City and County of San Francisco, State of California; that the summons in said action, as shown by the return endorsed thereon, was served on W. H. Pilch, President of the Perris Irrigation District, on the 10th day of April, 1903, by the Sheriff of said County of Riverside; that said Perris Irrigation District appeared in said action by Layfayette Gill, its attorney, and filed a notice of motion and motion to change place of trial, accompanied by the affidavit of W. H. Pilch, as President of said defendant District, and that thereafter an order was duly made by said Superior Court of the City and County of San Francisco, transferring said action to the Superior Court of the County of Riverside, State of California; that a copy of a certified copy of the summons in said action, together with

the return of service endorsed thereon, is attached to this affidavit and marked Exhibit "A"; that a copy of a certified copy of the Notice of Motion, and Motion to Change Place of Trial, and Affidavit of W. H. Pilch, filed in said action, are hereto attached and marked Exhibit "B."

That a copy of a certified copy of the verification of W. H. Pilch President of defendant district in case of Leeman vs. Perris Irrigation District, is attached hereto and marked Exhibit "C."

OSCAR C. MUELLER.

Subscribed and sworn to before me this 12 day of July, 1912.

[Seal] ANNA M. McGREW.

Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 26, 1915. [64]

Exhibit "A" [to Affidavit of Oscar C. Mueller—Summons in Cullen vs. Perris Irrigation District].

In the Superior Court of the State of California, in and for the City and County of San Francisco.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT, a Corporation,

Defendant.

Action brought in the Superior Court of the City and County of San Francisco, State of California, and the complaint filed in the office of the Clerk of the said City and County of San Francisco.

JOHN R. AITKIN,
Attorney for Plaintiff.

The People of the State of California Send Greeting to The Perris Irrigation District (a Corporation), Defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the City and County of San Francisco, State of California, within ten days after the service on you of this summons, if served within this county; or within thirty days if served elsewhere.

And you are hereby notified unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the City and County of San Francisco, State of California, this 2d day of July, A. D. 1900.

[Seal] WM. A. DEANE,
Clerk.
By E. M. Thompson,
Deputy. [65]

Sheriff's Office,
County of Riverside,—ss.

I hereby certify that I received the within Sum-

mons on the 9th day of April, A. D. 1903, and personally served the same on the 10th day of April, 1903, on W. H. Pilch, President of the Perris Irrigation District, being the defendant named in said Summons by delivering to said defendant personally in the County of Riverside, a copy of said Summons attached to a copy of the Complaint in the action therein mentioned.

Dated April 10th, 1903.

P. M. COBURN,
Sheriff.
By Z. T. Brown,
Deputy.

[Endorsed]: No. 2701. Superior Court, City and County of San Francisco, State of California. J. C. Cullen, Plaintiff, vs. The Perris Irrigation District, Defendant. Summons. Received April 9, 1903. P. M. Coburn, Sheriff. By L. A. Coburn, Deputy. Filed April 14, A. D. 1903. Albert B. Mahory, Clerk. By F. J. Dugan, Deputy. John R. Aitkin, Attorney for Plaintiff.

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true, and correct copy of the Summons in case of J. C. Cullen, vs. The Perris Irrigation District, a corporation, on file in my office.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal this 26th day of June, A. D. 1912.

A. B. PILCH,
Clerk.
By Chas. O. Reid,
Deputy Clerk. [66]

Exhibit "B" [to Affidavit of Oscar C. Mueller—Notice of Motion to Change Place of Trial in Cullen vs. Perris Irrigation District].

No. 2701.

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,
Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,
Defendant.

NOTICE OF MOTION.
and
MOTION TO CHANGE PLACE OF TRIAL.

Filed May 1, 1903.

ALBERT B. MAHORY, Clerk.

By F. J. Dugan, Deputy.

LAYFAYETTE GILL,
Attorney for Defendant. [67]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Plaintiff Above Named, and His Attorney, John R. Aitken:

You will please take notice that the defendant will on the 8th of May, 1903, at 10 o'clock A. M. of said day or as soon thereafter as counsel can be heard, in Department 4 of the Superior Court of the City and County of San Francisco, at the courtroom thereof, in the city of San Francisco, move the Court to make an order changing the place of trial of this action from the City and County of San Francisco to the County of Riverside, in the State of California.

Said motion will be made upon the grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action, wholly situated within the County of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the 1st day of January, 1891, was wholly within the County of San Diego, State of California, but thereafter pursuant to an Act of the Legislature of the State of California, entitled an Act to create

the County of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of the county seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties, [68] approved March 11, 1893, was taken entirely from within the boundaries of San Diego County and became, and ever since has been and now is, a part of the County of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made within the boundaries of the said Perris Irrigation District formerly in the County of San Diego, but now in the County of Riverside, as aforesaid and at no other place.

IV.

That the obligation or liability of the defendant, if any upon said contracts sued upon in this action arose originally in the said County of San Diego, but such if any obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the County of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said County of San Diego and made a part of the County of Riverside, pursuant to the said Act of the Legislature of the State of California, creating the County of Riverside, approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the County of Riverside, State of California.

VI.

That any obligation or liability arising or existing upon the contracts sued upon in this action is to be performed at the office of the treasurer of the said Perris Irrigation District, formerly in the County of San Diego, but now in the County of Riverside.

Said motion will be based upon the affidavits of W. H. [69] Pilch, president of the Board of Directors of said defendant, and George M. Pearson, County Surveyor of the said County of Riverside, copies of which affidavits are herewith served upon you; also based upon an Act of the Legislature of the State of California, entitled, "An Act creating the County of Riverside, etc." approved March 11th, 1893; and also based upon the verified complaint of the plaintiff herein, to which Act of the Legislature reference is hereby made. The aforesaid affidavits, the said Act of the Legislature and the complaint of the plaintiff herein will be used upon the hearing of said motion, a copy of said motion is also herewith served upon you.

LAYFAYETTE GILL,
Attorney for Defendant. [70]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Motion to Change Place of Trial.

Comes now the defendant above named and moves the Court to make an order changing the place of trial of this action from the City and County of San Francisco to the County of Riverside, upon the following grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action wholly situated within the County of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the first day of January, 1891, was wholly within the County of San Diego, State of California, but thereafter, pursuant to an Act of the Legislature of the State of California, entitled, "An Act to create the County of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of county seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties"; approved March

11th, 1893, was taken entirely from within the boundaries of San Diego County and became, and ever since has been and now is a part of the County of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made [71] within the boundaries of the said Perris Irrigation District, formerly in the County of San Diego, but not in the County of Riverside as aforesaid, and at no other place.

IV.

That the obligation or liability of the defendant, if any, upon said contracts sued upon in this action arose originally in the said County of San Diego, but such, if any, obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the County of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said County of San Diego and made a part of the County of Riverside, pursuant to the said act of the Legislature of the State of California, creating the County of Riverside, approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is and was at the time of the commencement of this action in the County of Riverside, State of California.

VI.

That any obligation or liability existing or arising

upon the contracts sued upon in this action is to be performed at the office of the Treasurer of said Perris Irrigation District formerly in the County of San Diego, but now in the County of Riverside.

This motion is based upon the affidavit of W. H. Pilch, President of the Board of Directors of the said defendant, the Perris Irrigation District, and upon the affidavit of George M. Pearson, County Surveyor of the said County of Riverside, which said affidavits are each attached hereto and made a part hereof, and will also be based upon an act of the Legislature entitled, "An Act creating the County of Riverside, etc.," approved March 11th, 1893, to which reference is hereby made.

LAYFAYETTE GILL,
Attorney for Defendant. [72]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit of W. H. Pilch [on Motion to Change Place of Trial in Cullen vs. Perris Irrigation District].

State of California,
County of Riverside—ss.

W. H. Pilch, being first duly sworn, deposes and says: That he is the President of the Board of Directors of the defendant herein, the Perris Irrigation

District; that the said Perris Irrigation District now is and was at the time of the commencement of this action wholly situated within the County of Riverside, State of California; that although said defendant, the Perris Irrigation District, was at the time of the issuance of the bonds and coupons sued upon in this action wholly located within the County of San Diego, said district has by an act of the Legislature of the State of California entitled "An Act to create the County of Riverside, etc., approved March 11th, 1893, been taken from the said County of San Diego and included within the said County of Riverside. That the contracts sued upon in this action were made within the said Perris Irrigation District formerly within the County of San Diego but now in the County of Riverside; that the obligation or liability arising upon said contracts or either of them, if any, existed at the time of the commencement of this action were and are to be performed within the said County of Riverside. That the principal and only place of business of the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the County of Riverside, in the State of California. [73]

Affiant further saith: That he has fully and fairly stated the facts of the case to Layfayette Gill, Esq., an attorney at law, and attorney for defendant herein, the Perris Irrigation District, and after so fully and fairly stating all the facts of the case to said attorney, he is advised by the said attorney that the defendant herein, the Perris Irrigation District, has a good and valid defense to plaintiff's cause of

action upon the merits thereof, and affiant verily believes from the advice given him by said attorney that the said defendant the Perris Irrigation District, has a good and meritorious defense to plaintiff's cause of action upon the merits thereof.

W. H. PILCH.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of California. [74]

In the Superior Court of the City and County of San Francisco, State of California.

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit of George M. Pearson [on Motion to Change Place of Trial in Cullen vs. Perris Irrigation District].

State of California,
County of Riverside,—ss.

George M. Pearson, being first duly sworn, deposes and says: My name is George M. Pearson; I now am and ever since the creation of the County of Riverside, in the State of California, have been the County Surveyor of the said County of Riverside; that during all of said time I have been and now am a regularly licensed surveyor.

That I am well acquainted with the boundary lines

of the said County of Riverside, and well acquainted with the boundaries of the said defendant, the Perris Irrigation District; that the said defendant, the Perris Irrigation District, now is and continuously has been ever since the creation of the County of Riverside, to wit, the 11th day of March, 1893, wholly within the boundaries of the County of Riverside.

GEO. M. PEARSON.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of California. [75]

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the Notice of Motion and Motion to Change Place of Trial in case of J. C. Cullen vs. The Perris Irrigation District on file in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal this 27th day of June, A. D. 1912.

[Great Seal of State.]

A. B. PILCH,
Clerk.
By Chas. O. Reid,
Deputy Clerk. [76]

Exhibit "C" [to Affidavit of Oscar C. Mueller—Affidavit to Answer in Leeman vs. Perris Irrigation District, etc.].

State of California,
County of Riverside,—ss.

W. H. Pilch, being duly sworn, deposes and says that he is President of the Board of Directors of the defendant in the above-entitled action; that he has heard read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters that he believes it to be true.

W. H. PILCH.

Subscribed and sworn to before me this 9th day of August, 1902.

[Seal] LAFAYETTE GILL,
Notary Public in and for Riverside County, State of California.

[Endorsement on Answer]: In the Superior Court of the County of Riverside, State of California. L. E. Leeman, Plaintiff, vs. Perris Irrigation District, Defendant. Filed Aug. 9, 1902. W. W. Phelps, Clerk. By H. M. Helmer, Deputy. Service of the within Answer is hereby admitted this 9th day of August, 1902. Wilfred M. Peck, Attorney for Plaintiff. Lafayette Gill, Atty. for Deft.

Affidavit [of W. H. Pilch to Answer in Leeman vs. Perris Irrigation District].

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk, and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the affidavit of W. H. Pilch to the Answer in the case of L. E. Leeman vs. Perris Irrigation District on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28th day of June, A. D. 1912.

[Seal] A. B. PILCH,
Clerk.
By Chas. O. Reid,
Deputy Clerk. [77]

[Endorsed]: No. 1226. In the United States District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Affidavit. Rec'd Copy of the Within Affidavit this 12th of July, 1912. Lewis R. Works, L. R. C., Atty. for Defendant. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, William M. Hiatt, Attorneys for Plaintiffs. [78]

[Order Denying Motion to Quash Service of Summons and Motion to Dismiss Cause, etc.]

At a stated term, to wit, The January Term, A. D. 1913, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the seventeenth day of February, in the year of our Lord one *thousand and* thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1226.

CONRAD ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Oscar C. Mueller, Esq., and Wm. M. Hiatt, Esq., appearing as counsel for plaintiffs; Frank W. Stafford, Esq., appearing on behalf of Lewis R. Works, Esq., as counsel for defendant; this cause having heretofore been submitted to the Court for its consideration and decision on defendant's motion to quash the service of summons herein, and also on defendant's motion to dismiss this cause; the Court, having duly considered the same, and being fully advised in the premises; now reads its conclusions in this and cases C. C. No. 1143 and C. C. No. 1256, and it is ordered that defendant's motion to quash the service of summons herein, and defendant's motion

to dismiss this cause be, and said motions hereby are denied; and Frank W. Stafford, Esq., on behalf of defendant's counsel, having moved the Court for a stay of proceedings herein; it is ordered that said cause be, and the same hereby is continued until Tuesday, the 18th day of February, 1913, at 10:30 o'clock A. M., for hearing on said motion. [79]

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Also Other Plaintiffs Against the Same Defendant, Being Cases C. C. Numbers 1226 and 1256.

Conclusions of the Court on Defendant's Motions to Quash and Dismiss.

The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

The Supreme Court of said State, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (Cowell vs. Stewart et al., 69 Cal. 525.)

The doctrine of this case, so far from being contrary to, is impliedly sanctioned in Reynolds vs. Page, 35 Cal. 296, 300, where the Court says:

> "The issuing of the summons intended, is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting [80] a valid service. * * * And we think the summons not issued within the meaning of the Act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal."

The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this court in any way conflict with the decision in Cowell vs. Stewart, *supra,* and said decision, I hold, is the law applicable to the case at bar.

This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties.

Defendant's motions are denied.

OLIN WELLBORN,
Judge.

[Endorsed]: C. C. No. 1143. United States District Court, Southern District of California, Southern Division. R. H. Thompson vs. Perris Irrigation District. Also C. C. Nos. 1226 and 1256. Conclusions of the Court on Defendant's Motions to Quash and Dismiss. Filed February 17, 1913. Wm. M.

Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [81]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

ESCHER & RAHN,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Notice of Motion [for Order Setting Aside Judgment].

To the Plaintiff and to Messrs. Oscar C. Mueller and Wm. M. Hiatt, Attorneys for Plaintiff.

YOU WILL PLEASE TAKE NOTICE that on Monday, March 31, 1913, at 10:30 o'clock A. M., or as soon thereafter as counsel may be heard, the defendant in the above-entitled action will move the Court, in the courtroom thereof, at Los Angeles, California, for an order setting aside the judgment in said action, which said judgment was entered therein on February 18, 1913, on the ground that the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

The said motion will be made upon the judgment-roll in said action.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
C. HUGHES JORDAN,
Attorneys for Defendant. [82]

[Endorsed]: No. 1226. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion. Received Copy of the Within March 26, 1913. Oscar C. Mueller, Wm. M. Hiatt, A. M. McGrew. Filed Mar. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821, H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, C. Hughes Jordan, Solicitors for Defendant. [83]

[Order Denying Motion to Dismiss Judgment.]

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the City of Los Angeles, on Monday, the thirty-first day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1226.

JOHN ESCHER et al.,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Wm. M. Hiatt, Esq., appearing as counsel for plaintiff, Lewis R. Works, Esq., appearing as counsel for defendant; now comes said Lewis R. Works, Esq., of counsel for defendant, and moves the Court to dismiss the judgment heretofore entered in this cause; and said motion having been presented and submitted to the Court for its consideration, and decision; it is now by the Court ordered that said motion to dismiss the judgment herein be, and the same hereby is denied. [84]

In the United States District Court, Ninth Circuit, in and for the Southern District of California, Southern Division.

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,

Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Assignment of Errors.

Now comes the defendant, Perris Irrigation District, plaintiff in error in the above-entitled cause,

and in connection with its petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred in the proceedings thereof, and upon which it relies to set aside and vacate the judgment of the court and reverse the order and judgment of the Court in overruling the motion of plaintiff in error to set aside and vacate the said judgment entered herein, as appears of record.

I.

That the Court erred in entering judgment in said action, because that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [85]

II.

That the Court erred in entering judgment in said action, because that the complaint therein was filed on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

III.

That the Court erred in entering judgment in said action, because that the said action was commenced on the 28th day of December, 1905, and that the sum-

mons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IV.

That the Court erred in entering judgment in said action, because that the said action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

V.

That the Court erred in entering judgment in said action, because that the same was commenced by the filing of a complaint [86] on the 28th day of December, 1905, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VI.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judg-

ment entered in said action, because that the said motion should have been granted, for the reason that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the complaint therein was filed on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [87]

VIII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the

Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IX.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

X.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the same was commenced by the filing of a complaint on the 28th day of December, 1905, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure [88] of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

Wherefore, plaintiff in error prays that the judg-

ment of the Court and the order overruling the motion to vacate and set aside the judgment of said Court be reversed, and that the mandate of the Court may issue directing that said motion be sustained, and that the judgment entered in said action be vacated and for naught held and taken.

LEWIS R. WORKS,
C. HUGHES JORDAN,
FRANK W. STAFFORD,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1226. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Assignment of Errors. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [89]

In the United States District Court, Ninth Circuit, in and for the Southern District of California, Southern Division.

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Petition for Writ of Error.

To the Honorable OLIN WELLBORN, Judge of the District Court Aforesaid:

Now comes the PERRIS IRRIGATION DISTRICT, a corporation, by its attorneys, and respectively shows that on the 18th day of February, 1913, the Court granted a default and a final judgment against the defendant in the above-entitled action; that the said defendant thereafter entered its special appearance for the purposes of its motion only, and filed its said motion in said court, praying the Court to vacate and set aside the judgment in said action on the ground that the summons was not issued within one year after the filing of the complaint in said action, which said motion was denied by the said Court on March 31st, 1913.

Your petitioner feeling itself aggrieved by the said order, and judgment entered therein, as aforesaid, hereby petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of

Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the [90] United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiffs in error, conditioned as the law directs.

LEWIS R. WORKS,
C. HUGHES JORDAN,
FRANK W. STAFFORD,
Attorneys for Petitioner in Error.

[Endorsed]: No. 1226. At Law. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners, Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Petition for Writ of Error. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [91]

In the United States District Court, Ninth Circuit, in and for the Southern District of California, Southern Division.

AT LAW—No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Order Granting Writ of Error.

BE IT REMEMBERED, That in the above-entitled action, the said PERRIS IRRIGATION DISTRICT, defendant, presented and caused to be filed, its petition praying that a writ of error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, be allowed, and at the same time presented and caused to be filed its assignments of error, all as required by the statutes and rules of said court.

The Court does this 16th day of August, 1913, grant said writ of error upon the giving of a bond in the sum of Three Hundred Dollars ($300.00), conditioned to answer all costs in said action, and on said appeal, if the plaintiffs in error fail to make good their plea.

OLIN WELLBORN,
Judge of the United States District Court, Southern District of California.

[Endorsed]: No. 1226. Law. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, Plaintiffs, vs. Perris Irrigation District, Defendant. Order Granting Writ of Error. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [92]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Citation [On Writ of Error (Copy)].

WHEREAS, the defendant in the above-entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment entered against said defendant in said action, in said District Court of the United States, in favor of the plaintiffs in said action, on the eighteenth day of February, 1913, for Eleven thousand, three hundred

thirty and 30/100 Dollars, and ——— Dollars, cost of suit.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned PACIFIC COAST CASUALTY COMPANY, a corporation organized and existing under the laws of the State of California, and duly authorized to transact a general surety business, does hereby undertake and promise on the part of the appellant that said appellant will pay all costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding THREE HUNDRED DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be affixed by its duly authorized officer at Los Angeles, California, the fifth day of June, 1913.

PACIFIC COAST CASUALTY COMPANY (Seal)

By HARRY D. VANDEVEER,

Its Attorney in Fact. [93]

State of California,

County of Los Angeles,—ss.

On this 5th day of June, in the year one thousand nine hundred and thirteen, before me, Leona Blum, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandeveer, known to me to be the duly authorized attorney in fact of the Pacific Coast Casualty Company, and the same person whose name is subscribed to the within instru-

ment as the attorney in fact of said company, and the said Harry D. Vandeveer, duly acknowledged to me that he subscribed the name of the Pacific Coast Casualty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

LEONA BLUM,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. 1226. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Escher & Rahn, Plaintiff, vs. Perris Irrigation District, Defendant. Undertaking on Appeal. Costs only. Approved August 16th, 1913. Olin Wellborn, Judge. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[94]**

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

No. 1226.

Clerk's Office.

CONRAD ESCHER and LOUIS RAHN, etc.,

vs.

PERRIS IRRIGATION DISTRICT.

Amended Praecipe [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue transcript on appeal now pending, containing:

The judgment-roll;

Default and all orders, praecipes, etc., relating thereto;

Motion to vacate and set aside service of summons, together with orders, notices, praecipes, etc., pertaining thereto;

Order denying above motion;

Motion to vacate judgment and set aside default, together with orders, notices, praecipes, etc., pertaining thereto;

Order denying above motion;

Petition for Writ of Error;

Assignment of Errors;

Order granting Writ of Error;

Writ of Error;

Citation.

FRANK W. STAFFORD,
C. HUGHES JORDAN,
Attorneys for Defendant.

[Endorsed]: C. C. No. 1226. U. S. District Court, Southern District of California, Southern Division. Conrad Escher and Louis Rahn, etc., vs. Perris Irrigation District. Amended Praecipe for Transcript. Filed Oct. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [95]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. No. 1226.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Plaintiffs,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

I, William M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the foregoing ninety-five (95) typewritten pages, numbered from 1 to 95, inclusive, and comprised in one volume, are a full, true and correct copy of the pleadings, and of all papers and proceedings upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the Conclusions of the Court, Assignment of Errors, Petition for Writ of Error, Order Granting Writ of Error, Bond on Writ of Error, and Amended Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error;

I do further certify that the cost of the foregoing record is $46.80, the amount whereof has been paid

to me by the Perris Irrigation District, a corporation, the [96] plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, this 9th day of December, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the one hundred and thirty-eighth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States, in and for the Southern District of California.
[97]

[Endorsed]: No. 2357. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, a Corporation, Plaintiff in Error, vs. Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed December 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to November 1, 1913, to File Record Thereof and to Docket Cause.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

PERRIS IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of November, 1913.

Dated at Los Angeles, September 5th, 1913.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. 3. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, Plaintiff in Error, vs. Conrad Escher et al., etc., Defendants in Error. Order Extending Time to File Record. Filed Sept. 6, 1913. F. D. Monckton, Clerk.

[Order Enlarging Time to January 1, 1914, to File Record Thereof and to Docket Cause.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

PERRIS IRRIGATION DISTRICT,
Plaintiff in Error,
vs.
CONRAD ESCHER and LOUIS RAHN, Copartners Doing Business as ESCHER & RAHN,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of January, 1914.

Dated at Los Angeles, October 18th, 1913.

OLIN WELLBORN,
United States District Judge, for the Southern District of California.

[Endorsed]: No..... United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, Plaintiff in Error, vs. Conrad Escher and Louis Rahn, Copartners Doing Business as Escher & Rahn, Defendants in Error. Order Enlarging Time to Docket Cause and File Record. Filed Oct. 20, 1913. F. D. Monckton, Clerk.

No. 2357. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to January 1, 1914, to File Record Thereof and to Docket Case. Refiled Dec. 26, 1913. F. D. Monckton, Clerk.

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No. 2357.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Perris Irrigation District,
Plaintiff in Error,
vs.
Conrad Escher and Louis Rahn, co-partners doing business as Escher & Rahn,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This action was commenced on December 28th, 1905, by the filing of the complaint in the office of the clerk of the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. On December 28th, 1906, an amended complaint was filed, verified by Oscar C. Mueller as attorney for the plaintiffs, and on the same day a summons was signed and sealed by the clerk of the court. In this case an affidavit by Oscar C. Mueller is in the record [Transcript, p. 57], in which it is stated that this action was commenced December, 1904, and sum-

mons was issued December 16th, 1905. This would impeach the records of the court, and is apparently a mistake, and the affidavit is merely one that was used in another case.

It is evident that the summons was not delivered to the marshal for service until January 3d, 1907 [Amended Return, Transcript, p. 35]. The original return shows the delivery to have been July 2d, 1907.

W. H. Pilch, Duncan McPherson and A. R. Fredericks were appointed directors July 7th, 1902 [Transcript, p. 47].

The first reference was made to the records of Riverside county, to determine who were the directors of the district by inspection of their bonds on file in the recorder's office in 1907 (more than a year after the commencement of the action).

The questions of law in this case (see specifications of error below) were raised by special appearance in the form of a motion to dismiss [Transcript, pp. 55, 56], and again by a motion to vacate judgment [Transcript, pp. 83, 84], there having been no general appearance on the part of the defendant district.

Specification of Error.

The assignment of errors [Transcript, p. 84 *et seq.*] sets out ten alleged errors which will be grouped for convenience with the original numbers in transcript in small type to the left of the first line.

1. That the court erred in entering judgment in said action, because that the summons therein was not issued within, but was issued after the expiration of,

one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

5. That the court erred in entering judgment in said action, because that the same was commenced by the filing of a complaint on the 28th day of December, 1905, and the summons therein was not delivered to the United States marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

8. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that said motion should have been granted for the reason that the said action was commenced on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of Cailfornia, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

9. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said

action was commenced by the filing of a complaint on the 28th day of December, 1905, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

ARGUMENT.

Summons was never legally issued for the reason that it was not issued within one year from the filing of the complaint.

Civil actions are commenced by the filing of a complaint.

C. C. P., Sec. 405;
Rule 6, Ninth Circuit.

The summons may be issued at any time "within one year" after the filing of the complaint.

C. C. P., Sec. 406;
Rule 7, Ninth Circuit.

Summons must be served by the marshal or his deputy.

Rule 8, Ninth Circuit.

From the record it appears that in this case the summons was not delivered to a person, or officer having power to serve it (that is to say, to the marshal or his deputy), within one year from the commencement of the action, by the filing of the complaint.

A Summons Is Not "Issued" Until It Is Delivered to Some Person or Officer Having Power to Serve It.

This rule is supported by abundant authority.

The case of Hekla Insurance Company v. Schroeder (9 Ill. App. 472, 475) is a case wherein it was necessary to determine what constitutes "issuance" of summons. There the court, after discussing numerous authorities, announces the rule "that the mere making out, signing and sealing of the summons by the clerk, or even its delivery by him to the plaintiff, or his attorney, is not the commencement of the suit, but that, before the writ can, in a legal sense, be regarded as issued, or the suit commenced, the writ must be either actually or constructively delivered to the sheriff for service."

That decision (Hekla etc. v. Schroeder) was apparently based in part on the proposition that, inasmuch as the sheriff is the only person empowered to serve summons, the summons is not issued until delivered to him, who can serve it.

In the case of White v. Johnson, 27 Oregon 282, 40 Pac. 511, the question of what constitutes issuance of a summons was raised. The court there said:

> "A summons may be said to have issued in an action commenced in the circuit or county courts of this state when it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff, with the intention that it be served upon the defendant. It is difficult to see how anything less than this would constitute an issuance of a summons. The statute requires that

> the summons shall be served by the sheriff, and, without a delivery to him for service, such instrument is not yet endowed with vitality for any purpose. Insurance Co. v. Schroeder, 9 Ill. App. 472; Ross v. Luther, 4 Cow. 158; and Mills v. Corbett, *supra*."

In Mills v. Corbett, 8 How. (N. Y.) 500, 502, the court said:

> "I think any process may be said to be issued, where it is made out and placed in the hands of a person authorized to serve it, and with a *bona fide* intent to have it served, if practicable."

Pease v. Ritchie, 24 N. E. 433, 434, is also authority (by analogy) supporting the contention of plaintiff in error. In that case (speaking of the writ of execution) the court said:

> "The question to be considered is whether, within the meaning of the statute, an execution issued on the judgment in favor of Wells, Norton & Walker within one year from the time it was rendered. As before observed, the clerk made out an execution within the year, but it was never delivered to the sheriff to execute, and when found an indorsement was found on the back of the execution, 'Not called for.' We do not think what was done here can be regarded as a compliance with the statute. The statute requires something more than the mere writing of an execution by the clerk, and placing it among the files in his office. The word 'issued,' as used in the statute, has a more comprehensive meaning, and we think that the fair construction of the word as used in the statute requires an execution to be made out, properly attested by the clerk, and delivered to the sheriff to be executed by him. The object of issuing an execution is to collect the judgment; but that object cannot be carried out unless the execution is placed in the hands of an officer for

> collection. The only conclusion we are able to reach, when the purpose of the statute is kept in view, is that an execution cannot be said to be issued within the meaning of the statute until it is delivered to the sheriff to execute."

The object of issuing a summons, is that it shall be served, and it is difficult to conceive how that object can be carried out if the writ remains in the hands of a person not qualified or empowered to serve it. As the learned court in the case just cited was unable to reach any conclusion but that a writ of execution must be delivered to the sheriff "to execute" in order that it might be said to have been issued, so we are unable to reach any conclusion but that a summons must be delivered to the marshal to be served before it can be said to have been issued.

The case of Reynolds v. Page is a California case dealing with a question somewhat similar to the one here involved. In that case a complaint had been filed and a summons duly signed and sealed delivered by the clerk to plaintiffs' attorney; but the summons was not placed in the hands of an officer or other person for service, and no certified copy of the complaint was prepared and delivered to the plaintiff, or his attorney, for nearly four years. The court in sustaining an order dismissing the action said: "The summons cannot be said to be issued within the meaning of the act, till it is in a condition to serve," and held, that inasmuch as the summons was not delivered in a condition to be served, it was not issued within the meaning of the law.

> "And we think the summons not issued within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal."
>
> Reynolds v. Page, 35 Cal. 296, 299, 300.

It seems clear that if a failure in one particular to place the summons in a condition to be served will render it void, and furnish ground for dismissal of the action, then failure in another particular to place it in condition to be served will also render it void (i. e., not issued). There can be no other reasonable conclusion.

What distinction can there be between its not being in a condition to be served, and its not being in the hands of a person empowered to serve it? In neither case can it be served.

See also:

Ross v. Luther, 4 Cowen (N. Y.) 158.

It will be observed by the court that in each of the cases above cited (except Pease v. Ritchie), the question directly involved is, What constitutes issuance of summons? In each of the cases this point was decided as necessary to the decision of other points; but nevertheless it was directly involved, and we are unable to find any point in any of these cases which would distinguish it from the case at bar.

The rule here contended for is also based on sound legal reasoning in this, that it recognizes the proposition that an action may be commenced, and the statute of limitations forestalled, while there is no *bona fide*

intent, or attempt, to obtain service or in any other manner proceed with the litigation. Moreover, it is the policy of the courts that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters.

There is another element of "issuance" to which we desire to call the attention of the court:

Summons must be delivered to some person empowered to serve it, *with a bona fide intent that it be served, if practicable.*

Mills v. Corbett, 6 How. (N. Y.) 500, 502;
Ross v. Luther, 4 Cowen (N. Y.) 158.

That in the case at bar there was no *bona fide* intent to serve summons is disclosed by the fact that, although there were on file (as required by sections 12 and 19 of an act "To provide for the organization and government of irrigation districts," etc. [Henning's General Laws of California, 1905, pp. 559, 562 and 565]) the bonds of the various officers of the Perris Irrigation District (containing the names of those officers), no effort was made to ascertain who they were until shortly before the summons was actually delivered to the marshal.

[See affidavit of Oscar Mueller, Transcript pp. 57, 58, 59, 63, 64 and 65.]

[Affidavit of Wm. M. Hiatt, Transcript pp. 60, 61 and 62.]

Section 12 of the above cited act is as follows:

"The officers elected at the election hereinbefore provided for shall immediately enter upon their duties as such, upon qualifying in the manner for

such officers herein provided. Said officers shall hold office respectively until their successors are elected and qualified."

Section 19, in part, is as follows:

"Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the superior court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board."

A defendant may have an action dismissed for want of prosecution, or it is the duty of the court to dismiss, of its own motion, where the record shows that summons has not been issued "within one year after the filing" of the complaint.

C. C. P., Sec. 581a;
Rule 7, Ninth Circuit;
Reynolds v. Page, 35 Cal. 296, 300;
People v. Davis, 143 Cal. 673, 675;
Wiencke v. Bibby, 15 Cal. App. 50, 53;
People v. Mulcahy, 159 Cal. 34, 35.

The case of Cowell v. Stewart (69 Cal. 525), on the authority of which the learned judge of the District Court decided this case, is readily distinguishable from the case at bar. In the Cowell case the proposition that the sheriff was the only person empowered to serve summons was not considered, and did not affect the decision. The question raised was that summons was not served within one year from the filing of the complaint. In fact the summons was during all of the

time in the hands of a person empowered to serve summons; it was in the hands of the attorney for the plaintiff, a person over the age of twenty-one years. Also, the delay was caused by the request of the defendant that the action be delayed, thus raising the point that the defendant should not profit by his own wrong.

In the United States Court (as has been heretofore set forth) the summons can only be served by the marshal or by one of his deputies.

Hence it follows that inasmuch as the law requires that a summons to be issued must be delivered to an officer authorized and empowered to serve it, with the *bona fide* intent that it be served; inasmuch as summons in this case was not issued, as required by law, within one year from the filing of the complaint; and inasmuch as the law provides that an action must be dismissed where summons has not been issued, as required by law, within one year after the filing of the complaint, that the District Court erred in the particulars above set forth in the specifications of error.

Respectfully submitted,

C. Hughes Jordan,
Frank W. Stafford,
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Attorneys for Plaintiff in Error.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Perris Irrigation District,
Plaintiff in Error,
vs.
Conrad Escher and Louis Rahn, co-partners doing business as Escher & Rahn,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

We controvert the statement of the case as presented by the plaintiff in error, as follows:

The complaint was filed December 28, 1905.

We contend that the summons was issued December 28, 1906.

The proceedings thereafter consisted of the following:

Summons received by the marshal July 2, 1907;

Summons served July 9, 1907;

Default of defendant for not answering entered September 12, 1907;

Judgment did not immediately fall on account of a bill in equity filed by property owners in the district seeking to restrain the prosecution of the action. See Quinton v. Equitable Investment Company, case #2093 of the files of this court—196 Fed. 314.

Notice of motion to set aside service of summons filed June 6, 1912;

Notice of motion to dismiss action filed June 19, 1912;

Judgment for $11,330.30 entered February 18, 1913.

IT WILL BE SEEN FROM THE FOREGOING THAT NEARLY FIVE YEARS ELAPSED AFTER THE ENTRY OF THE DEFAULT OF THE DISTRICT FOR NOT ANSWERING, AND THEN IT APPEARED SPECIALLY TO SET ASIDE THE SERVICE OF THE SUMMONS UPON THE GROUND THAT THE SUMMONS WAS NOT DELIVERED TO THE MARSHAL WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT, ALTHOUGH ADMITTING THE SIGNING, SEALING AND ATTESTING THE SUMMONS WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT.

As far as the efforts of Oscar C. Mueller and William M. Hiatt are concerned in locating the officers of the district, we call the court's attention to their affidavits found in folios 57-61, showing in detail their endeavors to find the officers upon whom service could be made. The officers of the district had apparently abandoned their positions and it required the services of private detectives to ascertain the whereabouts of the last known directors. When these were found service was made by the marshal. Commenting upon

the time elapsing from what we claim to be the issuing of the summons and the actual service, counsel say:

"It is not shown where the summons was during this period."

We contend that it makes no difference where the summons is after the clerk has performed all of his duties and it is in a *condition to be served.* We will show that it was issued within the year after the filing of the complaint and served within the three years allowed by the statutes. The burden is on the plaintiff in error to show that the summons did not leave the clerk's office until more than one year after filing the complaint. This it utterly fails to do.

ARGUMENT.

PLAINTIFF IN ERROR'S APPEAL RESTS SOLELY UPON THE CLAIM THAT THE JUDGMENT IS VOID ON ITS FACE. OTHERWISE IT MUST BE ADMITTED THAT PLAINTIFF IN ERROR WAS GUILTY OF LACHES IN PERMITTING FOUR YEARS AND NINE MONTHS TO INTERVENE BETWEEN THE DATE OF THE ENTRY OF THE DEFAULT OF THE DISTRICT AND THE DATE OF THE MOTION TO SET ASIDE THE DEFAULT.

The contention of the plaintiff in error is founded upon a theory that the judgment is void upon the face of the record. In other words, that the judgment roll shows upon its face such a lack of jurisdiction of the person of the defendant that the judgment is an absolute nullity. Plaintiff in error has no standing in court to be heard upon any question upon the merits of the

case or go into the procedure in the case on account of the fact that so many years intervened between the entry of the default of the plaintiff in error and the making of the motion to set aside the default. In support of this contention it will suffice to call the court's attention to People v. Davis, 143 Cal. 676, where the court said:

> "It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which *in no case exceeds one year.* It is also well settled law that a judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment roll. It is hardly necessary to cite authorities to sustain these propositions."

We also refer the court to the case of People v. Mulchy, 159 Cal. 35, where the court approves the foregoing rule, and says:

> "There can be no doubt of the correctness of the rule announced in the above cited case, and it therefore becomes our duty to scan the judgment roll and see whether or not invalidity of the judgment is apparent from an inspection thereof."

Again the Perris Irrigation District (plaintiff in error) was "out of court," on account of its failure to appear in the action. The effect of a default is shown in the recent case of Title Ins. & Trust Co. v. King etc. Co., 162 Cal. 44. The court said:

> "A default is entered by the clerk or by the court at the instance of the adverse party. It is a proceeding against the delinquent party. A de-

> fault cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered *is out of court* and not entitled to take any further steps in the cause affecting plaintiff's right of action."

Can it be said that a defendant who has permitted so many years to elapse after a default is entered against it, could nevertheless come into court by a special appearance and procure a dismissal of the action on the ground that the clerk did not *give* the summons to the marshal within one year after the date of filing the complaint, and at the same time admit that the clerk performed all of the duties imposed upon him by law?

And this in the absence of any showing that the district had no actual notice of the bringing of the action and the default. For anything that appears in the record the plaintiff in error may have had actual knowledge of the bringing of the action from the date of the filing of the complaint.

What Constitutes the Judgment Roll.

Section 670 of the Code of Civil Procedure of California provides that in cases like these the judgment roll shall consist of (1) the summons with the affidavit, or proof of service; (2) the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered; (3) a copy of the judgment.

Rule 16 of the Rules of Practice of the United States Circuit Court for the Ninth Circuit, Southern District

of California, provides that in cases like these the judgment roll shall consist of (1) the summons with the proof of service; (2) the complaint and a copy of the entry of the default of the defendant; (3) a copy of the judgment.

It will be seen that by this rule the judgment roll in this case is practically the same as that provided by the state practice.

The facts then, so far as material to this appeal, are shown in the foregoing statement of facts.

The plaintiff in error's contention is that because the return of service of summons by the marshal shows that the marshal received the summons more than a year after the complaint was filed that no summons was *issued* within a year, and that for this reason the judgment entered is a nullity—that is, absolutely void and not merely voidable.

Sufficient Under Laws of California.

There can be no question but that the issuance and service of the summons conformed to the California practice as established by the Code of Civil Procedure.

Section 405 of the Code of Civil Procedure provides that actions are commenced by filing the complaint.

Section 406 of the Code of Civil Procedure provides that a summons may be issued by the clerk at any time within one year thereafter.

Section 407 of the Code of Civil Procedure:

> "SUMMONS, HOW ISSUED, DIRECTED, AND WHAT TO CONTAIN. The summons must be directed to the defendant, signed by the clerk, and *issued under the seal of the court,* and must contain:
>
> 1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, etc."

Section 581a of the Code of Civil Procedure provides that actions shall be dismissed unless summons shall have issued within one year and shall have been served and return made within three years after the commencement of the action.

Under the laws of California a summons is issued when the clerk has performed all of the acts which the law requires that he should perform, namely, when he, the clerk, has signed the summons and attached the seal of the court thereto.

COWELL V. STUART, 69 CAL. 525, COMPLETELY ANSWERS THE QUESTION RAISED BY PLAINTIFF IN ERROR.

In the case of Cowell v. Stuart, 69 Cal. 525, the question of issuance was directly decided by the court. The court spoke of the 6th day of November, 1882, as being the day that a summons was duly signed and sealed, and afterwards referred to this date by saying: "Within a year thereafter (the date of filing of the complaint) the summons was issued by the officer charged by law with the duty of issuing it, namely, the clerk."

An examination of the transcript shows that summons was dated November 6, 1882, and that it was received by sheriffs as follows:

By the sheriff who served Stuart and Elder, December 20, 1882.

By the sheriff who served defendant Scheller, February 26, 1883;

And by the sheriff who served defendant Steele, January 19, 1883.

If a summons is only issued when delivered to the officer then in this case it was issued three times!

The facts are as follows:

The action was brought on promissory notes against five defendants. The complaint was filed November 9, 1881. On November 6, 1882, a summons was duly issued by the clerk. But, as stated by the court, "Neither *the summons* nor a copy of the complaint was served or placed in the hands of the sheriff for service *until after the expiration of one year from the time the complaint was filed,* nor was there any appearance within the year by either of the defendants."

On this account the issuance of the summons was attacked by the defendants. However, citing sections 405-6 of the Code of Civil Procedure, the court said:

> "When the clerk in the present case delivered to the plaintiff's attorney a summons duly signed and sealed, he had performed every act it was essential for him to perform in the matter. The action was commenced by the filing of the complaint and within a year thereafter the summons was issued by the officer charged by the law with the duty of issuing it, namely, the clerk. * * * When the officer who is charged with the duty of issuing

the summons has done all that the law requires him to do, we can see no ground for holding that the summons is not issued."

We contend that, as Judge Wellborn says, "The issue raised at this hearing depends upon the law of California, Rev. St. U. S., Sec. 914," the defendant in error had a right to rely upon this decision of the Supreme Court of California, construing the laws of California relating to the issuance of summons and it would be contrary to all sense of justice if the Perris Irrigation District could permit a default to be taken against it and then nearly five years thereafter move to set it aside upon the ground that the summons was not given to the marshal until after one year from the date of the filing of the complaint, and at the same time conceding that the clerk performed his duty in *making out and attesting the summons within year.* In the examination of the records in this case, let us see what the clerk of the court did. He took the complaint in this action and filed it on the 29th day of December, 1904; thereafter, to-wit, on the 16th day of December, 1905, he prepared a summons, placed the seal of the court thereon, signed his name [see transcript, folio 20]. Now this is all he was required to do. The statute of California says:

> "The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court and must contain * * *." (Sec. 407, C. C. P.)

There is not one word in this statute or any United States statute, that the clerk must deliver it to the

marshal. The *only* requirement, after the summons has been prepared by the clerk, is that it must be served within three years from the date of the filing of the complaint. The records of the clerk's office show the date of the issuance of the summons. Inasmuch as the law gives three years to serve the summons, what possible difference can it make to a defendant where the summons is lodged from the time that it is attested by the clerk and the time it is actually served?

Shall a judgment for $11,330.30 fall because the clerk of the court did not perform some act *not required of him?* And at the instance of a defendant who made no objection until nearly five years had elapsed after the entry of its default.

The plaintiff in error is in a very awkward position to complain of laches. It does not explain or attempt to explain its laches of nearly five years in allowing a default to remain undisturbed, and makes no showing that it did not know of the entry of the default.

On page 11 of the brief of the plaintiff in error, we find the following:

> "Moreover, it is the policy of the courts, that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters."

And yet the records in this case show that plaintiff in error was served with summons on the 9th day of July, 1907, and its default was entered on the 12th day of September, 1907, and this default remained *unquestioned* by the Perris Irrigation District for *nearly five years.* Why didn't the Perris Irrigation District help the courts by bringing an early hearing on its motion

to set aside the summons, if it is "the policy of the courts that all matters before them should be expedited"? After defaults are entered and allowed to remain undisturbed for so many years, are they then "dormant and stale matters," or when do they become such?

RULE 7 OF THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

> "RULE 7. DISMISSAL OF ACTIONS—FAILURE TO PROSECUTE—Whenever a complainant shall fail to have process issued upon any complaint hereafter filed in this court, within one year after the filing thereof against any defendant named therein, who has not voluntarily made a general appearance in the action, or who shall fail to make a *bona fide* effort to procure service of summons upon such defendant within sixty days after the issuing thereof, such defendant may, upon due notice to the complainant, have said complaint dismissed for want of prosecution; but this rule shall not affect the right of the court to dismiss actions for want of prosecution in other proper cases."

But here the Perris Irrigation District was "out of court" and could give no notice.

So far as we know no statute has been enacted by the congress of the United States requiring a summons in actions like these, to be issued within one year, or requiring its service within any given time. Plaintiff in error must, therefore, rely upon the above rule of court, and upon the requirement that all service of process in United States courts shall be by the marshal.

We contend that a judgment, to be absolutely void upon the face of the record, that is upon the

judgment roll, must show a failure to comply with some *positive enactment of the legislative body, or some fundamental law,* otherwise, if the judgment were sued upon in another court or in another state, the question of its validity or invalidity would depend upon proof of the rules of this court. In other words, the defect would not appear upon the face of the record without the proof of other matters.

Again, we contend that Rule 7 necessarily contemplates an application to the court to dismiss the action upon notice for want of prosecution. This being so it is an application to the jurisdiction of the court. This rule does not go to the extent of section 581a of the Code of Civil Procedure of California, which provides that if summons is not served and return made within three years, no further proceeding shall be had, and which has been held to deprive the courts of California of jurisdiction to proceed in such cases. But it is necessarily an application to exercise its jurisdiction, and if so the decision of the court made in the exercise of its jurisdiction is subject to be reviewed upon appeal, and does not make a judgment void upon the face of the record.

Section 914 of the Revised Statutes provides:

> "The practice, pleadings and forms and modes of proceedings in civil cases other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*"

First: Does Rule 7 of the Circuit Court of the Ninth Circuit, Southern District of California, require the dismissal of these actions, and does said Rule 7 apply to the service of summons to the exclusion of sections 406, 581 and 581a of the Code of Civil Procedure of the state of California?

At the time this action was brought the Code of Civil Procedure of California provided that an action was commenced by the filing of the complaint, that a summons must issue within a year thereafter and that it must be served, returned and filed within three years from the time the complaint was filed. In this case the defendant in error is strictly within the rules prescribed by the Code of Civil Procedure of California.

We believe that we are strictly within said Rule 7 of the Circuit Court in the issuing of process. We also claim that it is not the intent of this rule to permit a defendant to come in many years after service and move to dismiss the action because the service was not made within sixty days. Certainly this rule does not supersede the above direct provision of the California Code. We believe also that the true intent of the rule is to give the defendant a summary remedy by applying for dismissal and prevent a plaintiff from filing a complaint and keeping an action alive against a defendant indefinitely. *We claim it was never intended to apply to cases like those before the court where the plaintiffs have for so many years been actively engaged in strenuous efforts to bring the cases to a final hearing and determination.*

Some California Cases.

In the case of Churchill v. Woodworth, 84 Pac. 155 (Cal.), the court spoke of the issuance of the summons, saying: "On November 12, 1902, summons was issued upon the original complaint."

We made an examination of the transcript at the Los Angeles County Law Library and found that the summons was *dated* November 12, 1902, and was received by the sheriff December 25, 1902.

It will be seen that the court always speaks of the date of the summons as being the issuance of the summons.

In Modoc v. Superior Court, 128 Cal. 255, the court said:

> "The summons was issued upon the complaint September 4, 1897, and a copy of the complaint was served upon the defendant August 7, 1899."

An examination of the transcript shows that the summons was *dated* September 4, 1897, but that it was not received by the sheriff until August 3, 1899—*nearly two years after its issuance.*

In the case of Sharpstein v. Eels, 132 Cal. 507, the court said:

> "The summons was issued October 26, 1895, but was not served until February 6, nor returned until February 17, 1900."

An examination of the transcript shows that the summons was dated October 26, 1895, but that it was not received by the sheriff until January 29, 1900. In

the briefs the parties all seem to concede that the date of issuance was the date of the summons.

In Kennedy v. Mulligan, 136 Cal. 556, the complaint was filed May 29, 1896. The summons was dated May 22, 1897. See transcript S. F. No. 2016. The service was made March 24, 1898.

The Supreme Court said:

> "The summons *was issued within the year* and served within less than a year thereafter. No injury appears to have resulted to defendant, nor was he prevented by the delay from paying the judgment."

Fitman on Code Summons says:

> "By issuing a summons we are not to be understood as meaning its delivery to the sheriff or other proper officer for service. As we understand it, a summons is issued when it *is prepared, signed by the clerk, and sealed with the court seal, and is in all respects complete for delivery to a proper officer for service.*" (Page 8.)

In Alderman on Judicial Writ and Process the author says, in speaking of the date of the summons: "Such date is *prima facie* evidence of the date when it is issued."

In re James, 99 Cal. 374: A collateral attack upon a decree of divorce rendered by the Circuit Court of Missouri upon constructive service of process. This decree of the Circuit Court of Missouri was, by the Supreme Court of California, held to be good as against a collateral attack. The contention was that no process was ever issued by the Missouri court for the reason that the order which constitutes the process *was not signed by the clerk.*

Cases Outside of California.

We particularly call attention to:

Webster v. Sharpe, 116 N. C. 466, and

Currie v. Hawkins, 118 N. C. 593.

In the Webster case the court says:

> "The presumption is that it issued at the time it bears date, and the burden is on defendant to show that it did not."

In the case at bar the plaintiff in error does not attempt to assume this burden and has made no showing whatever.

In the Currie case the court says:

> "There remains to be disposed of the plea of the statute of limitations. The date of the issue of a summons when the matter is in dispute, depends upon the facts connected therewith. The presumption is in favor of its having been issued at the time it bears date. The defendant has introduced no testimony in this case tending to show the issuing of the summons was in fact after the date mentioned therein, and he relied *simply upon the fact that the sheriff's return showed that it was received two months and a half after its date, to prove that it was not issued on the day of its date. This fact alone does not rebut the presumption* that the summons was issued at the time of its date."

United States Statutes and Cases.

Section 911 of the Revised Statutes provides:

> "All writs and process issuing from the courts of the *United States* shall be *under the seal of the court from which they issue* and shall be signed by the clerk thereof."

Section 912 provides:

> "All process issued from the courts of the United States shall bear teste from *the date of such issue.*"

If summons is not issued until given to the marshal then it must be given to him the day it is dated to comply with this section.

IF COUNSEL'S CONTENTION BE UPHELD THEN THE JUDGMENTS IN NUMBERLESS CASES WOULD BE INVALIDATED BECAUSE THE DATE OF THE TESTE AND THE DATE OF THE RECEIPT OF THE PROCESS BY THE MARSHAL WOULD HAVE TO BE THE SAME TO AVOID ATTACK.

We believe that in the federal courts of the United States there are hundreds of adjudicated cases which, if the contention of the plaintiff in error is correct, could be opened any time and motions made to set aside the judgments upon the ground that while the date of the summons is attested by the clerk within one year of the filing of the complaint, nevertheless, its actual delivery to the marshal was after the expiration of the year.

If such be the law judgments of great import throughout the United States, rendered years ago and since acted upon, are void on their face and can be and are now subject to collateral attack.

In construing section 911 of the Revised Statutes, the court in Leas v. Merriam, 132 Fed. 512, said:

> "I think section 911 means *no more* than that when a writ of process *issues* from a federal court it *must be signed by the clerk and shall be authenticated in the manner therein set out.*"

No duty is imposed on the clerk to *also* deliver it to the marshal before he can say he has issued it.

In Jewett v. Garrett, Circuit Court, D., New Jersey, 47 Fed. Rep. 625, the court said:

> "The statute governing the issue of writs and process from the courts of the United States requires that such writs and process shall be under the seal of the court, and shall be signed by the clerk thereof (Rev. St. U. S., Sec. 911); and there is a further requirement that all process must bear teste from the day of its issue (*Id.*, Sec. 912). Other than in these necessary particulars, neither the form of the writ or process, nor its contents, *nor the manner of its delivery to the marshal for service,* nor its formal drafting, *is sought to be controlled, or affected by any legislation of congress,* further than to ordain generally that the writ shall, as to those particulars, as far as possible, harmonize with, and be similar to, the writs and processes obtaining under the code of procedure of the state in which the court has jurisdiction."

In the case of Van Dresser v. Oregon etc. Company, 48 Fed. 205, the court said:

> "The laws of the state providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring a party into court if the action were in court of competent jurisdiction under the *state* government, is lawful and sufficient for the purpose in actions commenced in this court."

Cases Cited by Plaintiff in Error.

We have examined the cases referred to in the brief of plaintiff in error, but they are not applicable to the

case now before the court. Most of the cases arise in jurisdictions where the summons or writ is made out by the attorney for the plaintiff and where it is held that an action is *commenced when the summons is issued* and where it is important to determine when an action is commenced so as to save the statute of limitations. In California an action is commenced when a complaint is filed. These cases turn upon the question of intention. If it is shown that there was a *bona fide* definite intention to bring the action at the time the writ or summons was made out and signed by the attorneys for plaintiff or by the clerk, the writ is considered issued. The real point in these cases is that a plaintiff cannot sue out a writ or have a summons issued and keep his claim alive so as to bar the statute of limitations, or, in other words, so as to commence an action until the proceedings have passed the place where the plaintiff or his attorney can suppress them and prevent any suit being commenced. These cases cannot apply to the specifications of error now before the court because this action was commenced by the *filing of the complaint. It is so provided by the rule of the Circuit Court and by the statutes of California.* The following are all of the cases cited by defendant and they fully bear out our position and are not in point upon the matters now before the court.

Hekla Insurance Co. v. Schroeder, 9 Ill. App. 472.

This case holds that an action is not commenced until summons is sued out, and that summons is not considered legally sued out until it is delivered to the

sheriff with the authority to make service, or it is transmitted to him for that purpose. The mere making out, signing and sealing the summons by the clerk and delivering to plaintiff or his attorney, is not the commencement of any suit so as to save the bar of the statute of limitations.

We understand, however, that in Illinois a summons can precede the filing of the complaint or declaration, so that it is within the power of plaintiff or his attorney *to suppress* the action at any time prior to the delivery of the summons to the sheriff with authority to serve it.

Pease v. Richie, 132 Ill. 638, 24 N. E. 433.

The statute provides that a judgment of a court of record shall be a lien on the real property of the person against whom it is obtained, in the county for which the court is held, for seven years from the time it is rendered; but provided, that when execution is not issued on a judgment within one year from the time it becomes a lien, it shall thereafter cease to be a lien. * * * The clerk made out an execution within the year; but it was never delivered to the sheriff to execute, and when found, an endorsement was found on the back of the execution, "Not called for."

Held not a compliance with the statute.

The statute requires something more than the mere writing of an execution by the clerk and placing it among the files in his office.

Mills v. Corbitt, 8 How. Pr. 500.

Statute provided that an attachment could issue at any time after summons was issued, and it was held

that if the summons was made out and signed by the attorney, with the actual intention of having the same served, it was not necessary that it be delivered to the sheriff prior to the issuing of the attachment. We think the case turns on the question of intention.

Ross v. Luther, 4 Cowan (N. Y.) 158.

Action of debt against the sheriff for escape of prisoner from the jail limits.

Writ had been filled up sometime previous and left with clerk in the office of the plaintiff's attorney to be issued when he could ascertain that prisoner was off the limits. There was not an absolute intention that the writ should be delivered to the coroner in the first instance. It was committed to the clerk of the attorney to exercise his discretion. This discretion cannot be committed to an agent or messenger, and the suit was not commenced until the actual delivery to the coroner.

White v. Johnson, 27 Ore. 282, 40 Pac. 511.

The real question decided in this case is that no proper summons was issued and served upon the executrix of a defendant who had died after the filing of the complaint.

The court, however, takes up the question of the proper issuance of an attachment, and holds that under the laws of Oregon, which provide that an attachment cannot issue until after a summons is issued, that summons is not issued until delivery to the sheriff. It will be noticed, however, that in Oregon a summons is made out and signed by the plaintiff or his attorney and *not by the clerk*. We claim this case only goes so

far as to hold that the proof of intention to issue summons is established by its delivery to the sheriff, and falls within the same rule as the other cases cited by defendant, that the issuance of the summons is a question of intention. It may, however, be construed as going further in holding what can be considered evidence of such intention.

Conclusion.

We contend:

(a) That counsel for plaintiff in error has failed to establish the invalidity of the judgment.

(b) That the defendant in error complied with the statutes of California in causing the summons to be issued by the clerk December 28th, 1906—within one year from the date of the filing of the complaint (December 28th, 1905), and caused the same to be served July 7th, 1907, within three years from the date of filing the complaint.

(c) That the court below properly refused to set aside the default of the district entered September 12, 1907, in view of the fact that the application therefor was not made until June, 1912—nearly five years after the entry of the default, and no showing has been made that such refusal was an abuse of discretion.

That plaintiff in error has not shown that Judge Wellborn was in error in rendering the following decision:

> "The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

"The Supreme Court of said state, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (Cowell v. Stewart *et al.*, 69 Cal. 525.)

"The doctrine of this case, so far from being contrary to is impliedly sanctioned in Reynolds v. Page, 35 Cal. 296, 300, where the court says:

" 'The issuing of the summons intended is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. * * * And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.'

"The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this court in any way conflict with the decision in Cowell v. Stewart, *supra,* and said decision, I hold, is the law applicable to the case at bar.

"This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties."

Respectfully submitted,

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